88-1803

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1989

DAVID EDWARD GLENDENING,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

I. Does using a two-way mirror to prevent the complaining witness from seeing or hearing the Petitioner, over objection and without an individualized showing of necessity, conflict with *Coy v. Iowa* and thereby violate the Petitioner's sixth amendment confrontation right?

II. Does admitting over objection the repudiated hearsay statements of a three and one-half year old complaining witness who did not understand the difference between telling the truth and telling a lie conflict with *Ohio v. Roberts* and thereby violate the Petitioner's sixth amendment confrontation right?

III. Does applying Florida's new statutory child abuse hearsay exception to an offense occurring before its effective date to allow otherwise inadmissible hearsay into evidence on the theory that unconfronted videotaped testimony is constitutionally equivalent to live, confronted testimony at trial substantially diminish the constitutional right to confrontation in violation of the prohibition against *ex post facto* laws?

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner David Edward Glendening respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Florida Supreme Court, entered in the above-entitled proceeding on December 1, 1988. Rehearing was denied by the Florida Supreme Court on February 3, 1989.

OPINIONS BELOW

The intermediate Florida appellate court, the Second District Court of Appeal, issued a modified opinion affirming the Petitioner's conviction in *Glendening v. State*, 503 So. 2d 335 (Fla. 2d D.C.A. 1987), reprinted in the appendix, p. A-1, *infra*. The Supreme Court of Florida also affirmed in *Glendening v. State*, 536 So. 2d 212 (Fla. 1988), reprinted in the appendix, p. A-11, *infra*. Over a dissent, the Florida Supreme Court denied the Petitioner's motion for rehearing and clarification.

JURISDICTION

Petitioner seeks review of the Florida Supreme Court's

December 1, 1988, affirmance of his conviction and its February 3, 1989, denial of his timely petition for rehearing. On March 16, 1989, Justice Anthony M. Kennedy entered an order extending the time for filing this petition to and including May 4, 1989. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1257(a) (West Supp. 1989).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

2. Fla. Stat. § 92.53 (1987), the Florida statute permitting the replaying of videotaped depositions in lieu of the live testimony of witnesses under age sixteen in sexual or child abuse cases, is reprinted in the appendix, p. A-27, *infra*.

3. Fla. Stat. § 90.803(23) (1987), the Florida hearsay exception for the statements of children in sexual abuse cases, is reprinted in the appendix, p. A-29, *infra*.

STATEMENT OF THE CASE

Based on an allegation of anal penetration, Petitioner David Edward Glendening was charged with a single count of sexual battery on a child eleven years of age or younger. He was convicted and sentenced to life imprisonment with a mandatory minimum term of twenty-five years. *Glendening*, 536 So. 2d at 214.

Before trial the State of Florida moved pursuant to a new Florida statute to videotape the testimony of the alleged victim, the Petitioner's three and one-half year old daughter, and to introduce the videotape at trial in lieu of the child's live testimony. The statute provided that on a showing of a "substantial likelihood" the witness "would suffer at least moderate emotional or mental harm" if required to testify in open court, the court could require the defendant to view her testimony from

outside her presence by a two-way mirror, so that the defendant could observe and hear her testimony, but the child could not see or hear the defendant. Fla. Stat. § 92.53(1), (4) (1987).

Petitioner Glendening vigorously opposed the prosecution's motion for videotaping. He argued that concealing him from the child's sight and hearing by using a two-way mirror and replaying the videotape at trial instead of requiring her to testify live in his presence violated his sixth amendment right to face-to-face confrontation. R 199, 200, 290, 294, 554.

The State contended the videotaping procedure did not infringe the Petitioner's sixth amendment right on the theory that while the confrontation clause guarantees cross-examination, it does not afford the accused a literal right to physically confront his accuser face-to-face at trial. The prosecutor stated:

> *The defense is arguing David Glendening won't get to look his daughter in the eye.* Well, I don't know what the purpose of that is other than intimidation because *that's not the purpose of the confrontation clause.* The confrontation [clause] is for the purpose of cross-examination and the purpose of allowing the witness and the jury to see each other and evaluate credibility. *It has nothing to do with the defendant's right of physical confrontation.*

R 209 (emphasis supplied).

The risk of "moderate emotional or mental harm" that the State had to prove before the videotaping would be permitted was not defined by the statute, although the statute did require the trial court to conduct a hearing and make specific findings of fact as to the basis for its ruling. Fla. Stat. § 92.53(1), (7) (1987). To resolve the "moderate emotional or mental harm" issue, the trial court received testimony from two lay people, a social worker, and a pediatrician. *Glendening,* 536 So. 2d at 218. The child did not testify.

There was no testimony at the hearing from a psychologist, psychiatrist, or other qualified mental health professional that

the child would suffer moderate emotional or mental harm if required to testify in her father's presence. While the State did present testimony that the child feared her father, a substantial amount of evidence and argument was either inconsequential or went only to show the child would, if required to testify live and in court, experience the same general fears and anxieties any child witness would assertedly experience in the same circumstance.[1]

Before he had even passed on the question of whether the child's testimony would be taken by videotape, the trial judge announced that the Petitioner would be excluded from the child's presence. R 245. Finding there was not yet sufficient evidence of a risk of moderate emotional harm to order the child's testimony videotaped, the court stated that irrespective of his eventual decision on the videotaping motion, Petitioner would not be permitted to physically confront the child face-to-face at any stage of the proceedings. Without articulating any test, standard, rule, or legal basis for his decision, the trial judge stated:

> Right now based upon what I've heard here, the action that the court would take would be to have the father so that the child would not see the father if she had to testify in court and I would grant your motion, I mean I would assure you that I would do that, I would not allow physical confrontation between the child and the father here in the courtroom or prior to being in the courtroom. But I would not at this point grant your motion for the videotape. I believe there would need to be additional facts.

R 245.

After taking additional testimony, the trial judge granted

1/ For example, the prosecutor contended generally that the child's age, three and one-half years, in and of itself made the situation "intimidating." R 244. The social worker stated "in general most three and one-half year olds would be frightened by coming into this strange environment with so many people around getting asked a lot of questions." R 275. The pediatrician, who had examined the child for only twenty minutes four months earlier, conceded he did not know the status of the child's mental condition at the time of the hearing. R 259, 263-64, 285. The child's mother had never even explored the question of testifying with the child. R 224-25.

the State's motion to replay the child's videotape in lieu of her live trial testimony, and confirmed his earlier statement that he would exclude the Petitioner from the child's presence. R 286, 556. Ruling summarily without mentioning any specific facts or evidence, the judge simply recited the statutory boilerplate. R 286. The court's written order merely stated the motion was "granted." R 394.

Before trial, Petitioner Glendening moved to exclude the out-of-court statements purportedly made by the child that the State was seeking to introduce through a recently enacted Florida statute creating a new hearsay exception for statements of children in sex abuse cases.[2] As he had done previously in challenging the videotaping statute, Petitioner Glendening urged the new hearsay exception was unconstitutional under the sixth amendment confrontation clause. Because he was charged with an offense allegedly occurring before the statute's effective date, he also contended its application to his case violated the prohibition against *ex post facto* laws. *Glendening,* 536 So. 2d at 214.

The trial court and the parties recognized that before the child would be permitted to testify live or by videotape, it first had to be determined that she was a competent witness under Florida law. *Glendening,* 503 So. 2d at 338; R 311, 423, 708. The defense argued strenuously and repeatedly that the child lacked the competency to be a witness. *Id.* at 219; R 41, 75, 311, 423, 710, 735-80. At the videotaping session before she was permitted to testify as to the facts of the case, the child was examined by the court and by the prosecutor to determine her competency. R 756-68.

Under Florida law, a child is not competent to testify unless the "court determines the child understands the duty to tell the truth or the duty not to lie." Fla. Stat. § 90.605(2) (1987).

2/ The statute, reprinted in the appendix, p. A-29, *infra,* provides that otherwise inadmissible hearsay statements of children in such cases are admissible if the trial court finds "sufficient safeguards of reliability," and the child either "testifies," or is "unavailable" due to a substantial likelihood that participation in the trial will result in "severe emotional or mental harm." Fla. Stat. § 90.803(23) (1987).

Repeated questioning revealed the child did not know the meaning of telling the truth or telling a lie, and that she could not distinguish good from bad.[3] The trial judge specifically found the child did not know the meaning of telling the truth or telling a lie and was not able to distinguish between the words "truth" and "lie." The court also found the child did not understand the concept of "good or bad," and that she was "unable to articulate the difference between right and wrong or telling the truth or telling a lie." R 761-62, 764, 767-68, 771-72, 778-79, 787. Even the prosecutor conceded that the child was incompetent and unable to distinguish between the truth and a lie. R 913.

Nevertheless, confessing he did not know the correct legal test to apply, the trial judge ruled the child competent. R 779-80. Candidly admitting his uncertainty, the court suggested this issue would be better handled by the appellate courts:

> I don't really think there are any cases that have specifically decided if that in that context, I mean they've written these wonderful statutes about young children coming in and testifying, but I don't think in any of them have clearly decided, and *clearly she was unable to articulate the difference between right and wrong and telling the truth or telling a lie. So I think this is a good case for* [the appellate courts] *to decide.*

R 787 (emphasis supplied).

The child's videotaped testimony, which was eventually presented to the jury, totally exculpated and exonerated the Petitioner. *Glendening,* 536 So. 2d at 218. Responding to at least 18 questions from the State and the court, many of which were repetitive, leading and suggested incriminatory responses, the child steadfastly denied the Petitioner had ever committed the sexual

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3/ Pertinent portions of the transcript of the competency hearing are reproduced in the appendix, p. A-30, *infra.*

battery alleged.[4] R 792-98; 835, 837-39. In contradiction to all of the child's incriminating hearsay statements the prosecution had given notice it intended to introduce, the child "not only did not implicate the defendant in any wrongdoing, but specifically stated that he had not hurt her." *Glendening,* 536 So. 2d at 218.[5]

On appeal, the Supreme Court of Florida approved the decision of the District Court of Appeal and affirmed the Petitioner's conviction. *Glendening,* 536 So. 2d 212. Although using the two-way mirror during the videotaping had completely prevented the child from having ever seen or heard the Petitioner at any phase of the prosecution, the Florida Supreme Court declined to reverse under this Court's recent decision in *Coy v. Iowa,* ____ U.S. ____, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988), concluding instead that the instant case was distinguishable and that any errors were harmless.[6] *Glendening,* 536 So. 2d at 217-18. The court also held the trial judge did not abuse his discretion in determining the child was competent to testify, and that in any event, it was not necessary for the child to be testimonially competent for her hearsay statements to be admitted.[7] *Id.* at 219. Further, the Florida Supreme Court held the application of the new hearsay exception to Petitioner's case did not violate the prohibition against *ex post facto* laws.

4/ When repeated questioning failed to elicit even a single incriminating remark, the court adjourned the proceeding, suggesting the child was fatigued and unable to give "meaningful" testimony. R 800, 802-03, 814. When asked by the court and the prosecutor, however, the child stated that she was not tired. R 795, 802. Questioning resumed the next day, and the child's testimony remained totally exculpatory. R 835, 837-39. When it was again suggested her responses were the result of fatigue, the child replied, as before, that she was not tired. R 838.

5/ Apparently prompted by the child's exoneration of the Petitioner and refutation of her own hearsay statements, the trial court inquired of the State if it intended to go forward with the prosecution. R 823.

6/ *Coy* was not decided until after the close of the briefing and oral argument in this case, so that its application to the instant facts was not argued by the Petitioner until he filed his motion for rehearing, after the Florida Supreme Court had already issued its opinion affirming the conviction.

7/ The intermediate appellate court declined to affirm the trial judge's competency ruling, instead holding only that her competency was not a precondition to admitting her hearsay statements. *Glendening,* 503 So. 2d at 340.

REASONS FOR GRANTING THE WRIT

I. USING A TWO-WAY MIRROR TO PREVENT THE COMPLAINING WITNESS FROM SEEING OR HEARING THE PETITIONER, OVER OBJECTION AND WITHOUT AN INDIVIDUALIZED SHOWING OF NECESSITY, CONFLICTED WITH *COY V. IOWA* AND THEREBY VIOLATED THE PETITIONER'S SIXTH AMENDMENT CONFRONTATION RIGHT.

In *Coy v. Iowa,* ____ U.S. ____, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988), the United States Supreme Court held the sixth amendment right to face-to-face confrontation was violated by an Iowa statute permitting use of a large screen at trial that enabled the defendant to perceive his child accusers but completely prevented the witnesses from seeing him. Exactly like the screen in *Coy,* the two-way mirror used in this case completely prevented the witness from hearing or seeing the Petitioner. Nevertheless, the Florida Supreme Court upheld the constitutionality of the Florida videotaping statute, holding *Coy* was distinguishable and any error was harmless. *Glendening,* 536 So. 2d at 212, 217-18. Because the Supreme Court of Florida's analysis directly conflicts with *Coy,* certiorari should be granted.

A. *In conflict with Coy, the Florida videotaping statute did not require and the trial judge did not make an individualized finding of necessity to justify an exception to the right to face-to-face confrontation.*

In *Coy,* this Court held that a legislatively imposed presumption that child witnesses in sex abuse cases will experience trauma in testifying is *not* a "necessity" in furtherance of an "important public policy" that would justify an exception to the literal right to *"meet face-to-face* all those who appear and give evidence *at trial."* 108 S. Ct. at 2803 (emphasis in original). Leaving open the question of whether any exceptions to this right exist, the Supreme Court specifically held that such a presumption, without individualized findings that particular witnesses needed special protection, "could not be sustained by any conceivable exception." *Id.*

The Florida Supreme Court's decision in *Glendening* conflicts with *Coy* because it upheld a statute authorizing denial of a defendant's right to face-to-face confrontation based on the same legislative presumption of trauma expressly disapproved in *Coy*. In distinguishing *Coy*, the Supreme Court of Florida deemed the trial court's quotation of the statutory language with the child's name inserted to be a "case-specific finding of necessity" in furtherance of an important public policy to protect child witnesses. 536 So. 2d at 218. Such a finding based on a risk of "moderate" emotional harm goes only to the same "legislatively imposed presumption of trauma" that *Coy* rejects as justifying an exception to rights under the confrontation clause.

As this Court noted in *Coy*, trauma is a necessary component of our adversary system of justice and an important feature of the right to face-to-face confrontation. It is the aim of the confrontation clause to secure for a criminal defendant "the profound effect upon a witness of standing in the presence of the person the witness accuses," even if "[t]hat face-to-face presence may, unfortunately, upset the truthful rape victim or abused child." 108 S. Ct. at 2802. Confrontation may also "confound and undo the false accuser, or reveal the child coached by a malevolent adult." *Id.*

A finding of "moderate emotional harm" under the Florida statute cannot be distinguished from the normal effect of confrontation on any witness the confrontation clause requires the

State to produce.[8] In contrast to Florida's insufficient standard, the courts of other states have required that the child witness be rendered unable to communicate in the defendant's presence. *See State v. Vincent,* 768 P.2d 150, 164 (Ariz. 1989); *People v. Johnson,* 118 Ill. 2d 501, 115 Ill. Dec. 384, 517 N.E.2d 1070 (1987); *State v. Eaton,* 44 Crim. L. Rep. 2444 (Kan. 1989); *Wildermuth v. State,* 310 Md. 496, 530 A.2d 275, 286 (1987); *State v. Sanchez,* 752 S.W.2d 319, 322-23 (Mo. 1988) (en banc). A number of other states' statutes also hinge videotaped testimony on standards much more demanding than Florida's "moderate

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8/ The situation would be different if the Florida statute protected against a properly defined risk of "severe" or "permanent" harm. Ironically, before its amendment in 1985, the Florida videotaping statute required proof of "severe" rather than mere "moderate" harm. Act of May 31, 1985, ch. 85-53, § 5, 1985 Fla. Laws 140, 142 (codified at Fla. Stat. § 92.53). Likewise, the new Florida statutory hearsay exception for statements of child witnesses in child sex abuse cases allows introduction of hearsay of children who are otherwise "unavailable" due to a substantial likelihood of *"severe* emotional or mental harm." Fla. Stat. § 90.803(23)(a)(2)(b) (1987) (emphasis supplied).

Relatedly, to avoid face-to-face confrontation, other states demand the child must evince more than nervousness, excitement, or reluctance. *Craig v. State,* 76 Md. App. 250, 544 A.2d 784, 801 (Ct. Spec. App.), *cert. granted,* 314 Md. 458, 550 A.2d 1168 (Md. 1988); *see also Hochheiser v. Superior Court,* 161 Cal. App. 3d 777, 792, 208 Cal. Rptr. 273, 283 (2d Dist. 1984); *State v. Kuone,* 243 Kan. 218, 757 P.2d 289, 297 (1988). It has been recognized that mere reluctance in contrast to actual inability may stem from fabrication as well as fear, embarrassment, and guilt. *People v. Johnson,* 146 Ill. App. 3d 640, 100 Ill. Dec. 330, 497 N.E.2d 308, 318 (5th Dist. 1986) (Harrison, J., dissenting), *rev'd,* 118 Ill. 2d 501, 115 Ill. Dec. 384, 512 N.E. 2d 1070 (1987). In fact, whether testimony in court is really even traumatic for children is hotly disputed. *See Hall v. State,* 44 Crim. L. Rep. 2396 (Miss. 1989). It may be less traumatic for children than it is for adults, *see* Bulkley, *Introduction: Background and Overview of Child Sexual Abuse,* 40 U. Miami L. Rev. 5, 11 (1985), or even therapeutic. *Id.* at 10; Taylor, *Lawyers Consider the Alternatives,* Nat'l L. J., Mar. 20, 1989, at 26, col. 3.

emotional harm."[9]

Telling evidence that the Florida statute is founded on the same "legislatively imposed presumption of trauma" *Coy* disapproved is, ironically, presented in the Florida Supreme Court's own decision. Acknowledging the State legislature's general intention in enacting the videotaping statute was to spare children - all children - the trauma of testifying in open court,[10] the Florida Supreme Court quoted the prefatory language of the statute where the legislature declared: "WHEREAS, it is necessary that safeguards be instituted for the children of the State of Florida who are victimized to assure that their *right to be free from emotional harm and trauma occasioned by judicial proceedings* is protected by the court...." *Glendening*, 536 So. 2d at 216 n.1.[11]

Furthermore, the standard of necessity in the Florida statute

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9/ Colo. Rev. Stat. Ann. § 18-3-413(4) (Bradford 1986) (emotional trauma so that victim is medically or otherwise unavailable); Ind. Code Ann. § 35-37-4-6(c)(2)(B) (West 1986) (unavailable if psychiatrist certifies that testifying would be traumatic or physician certifies medical reasons for child not to testify); Mich. Stat. Ann. § 27A.2163(13) (Callaghan Supp. 1988) (incapable of testifying); Minn. Stat. Ann. § 595.02(4) (West Supp. 1989)(psychologically traumatize so as to render witness unavailable); N.M. Sup. Ct. R. Ann. 1986, 5-504(B)(1) (Cum. Supp. 1988) (unreasonable or unnecessary harm); Ohio Rev. Code Ann. § 2907.41(B)(1)(b) (Page 1987) (serious emotional trauma); S.D. Code Ann. § 23A-12-9 (Supp. 1987) (substantially detrimental).

10/ The Florida statute is in this respect even broader and less defensible than the unconstitutional statute in *Coy*. The Iowa statute applied only to the children most at risk of experiencing serious emotional harm, the complaining witnesses. 108 S. Ct. at 2799. The Florida Statute, on the other hand, applies to any "victim *or witness* who is under the age of sixteen." Fla. Stat. § 92.53(1) (1987) (emphasis supplied).

11/ Not quoted by the Florida Supreme Court but also showing the statute was based on the same presumption impermissible in *Coy* and is focused solely on the general characteristics of age and status rather than individualized considerations of specific harm, the Florida legislature also stated: "WHEREAS, children are in need of special protection as victims or witnesses in the judicial system as a result of their *age* and *vulnerability* . . ." Act of May 31, 1985, ch. 85-53, 1985 Fla. Laws 140 (emphasis supplied).

is too vague to provide adequate guidance to the court hearing the motion. The "moderate emotional or mental harm" the State must show for excluding a defendant is left undefined, and there is no indication of what is necessary to show a "substantial likelihood" of a child experiencing it. Unlike other statutes, the Florida statute does not include any factors to be considered, any standard of proof, or any indication of what evidence is a proper ground for the determination. It does not even require the trial court to personally examine the child. The statutes of other states direct trial judges to consider specific behavioral indicators[12] or various factual circumstances of the child, the offense, and the defendant.[13]

Contrary to the Florida Supreme Court's attempt to distinguish *Coy,* the Florida statute is not salvaged by the additional requirement that the trial court must make specific findings showing the basis for "moderate harm." Such findings, even if detailed and specific, can have no significance since they are made in furtherance of the invalid "moderate harm" standard. Moreover, even if the required findings could cure the statute's facial unconstitutionality, certiorari should still be granted because the trial court in this case made no such findings at all.[14]

Although the trial judge's decision to forbid the Petitioner the opportunity to confront the child face-to-face was apparently based on the trial judge's conclusion that the child feared the Petitioner, since no specific findings were made, its precise basis cannot be known. The trial court's ruling excluding the Petitioner

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12/ Colo. Rev. Stat. Ann. § 18-3-413(3) (Bradford 1986); Miss. Code Ann. § 13-1-407(4) (Harrison/Law. Co-op. Supp. 1988).

13/ Ala. Code Ann. § 15-25-2(a) (Michie Supp. 1988) (age and maturity of child, nature of offense, nature of testimony expected, possible effect of testimony at trial along with any other relevant matters required by Supreme Court rule); Mo. Stat. Ann. § 491.680(a) (Vernon Supp. 1989) (elements of offense charged, emotional and psychological trauma if required to testify in open court or to be brought into the personal presence of the defendant); Wis. Stat. Ann. § 967.04(7)(b) (West Supp. 1987) (10 factors listed).

14/ The court ruled summarily and cited no evidence in support of his decision. At the hearing, he simply recited the statutory boilerplate that there was "a substantial likelihood" that the child would, if required to testify, "suffer at least moderate emotional or mental harm." R 286. His written order stated only that the motion was "granted." R 394.

came at the same time he declared the State had not yet proved even a likelihood of the moderate emotional or mental harm required for videotaping. R 245. For this reason, the generalized "fear" on which the judge's ruling was based could not have risen even to the low level of the constitutionally deficient moderate harm the statute required for videotaping.

The trial court's eventual ruling to permit videotaping based on a risk of moderate emotional or mental harm does not cure the constitutional error. Since in violation of the Florida statute the court made no individualized findings of fact on the record showing the basis for his rulings, it cannot be known whether the trial judge relied at least in part on testimony and argument going to show that the child in this case would suffer the same generalized, non-specific trauma, harm, and anxiety that any similarly situated three and one-half year old would experience. Such generalized, presumed trauma is insufficient under *Coy*.

At this writing, thirty-seven states have statutes authorizing the videotaping of children's testimony. Predictably, these statutory responses differ dramatically.[15] If any exception to the right to face-to-face confrontation is recognized, it must be necessary to further an important public policy, *Coy*, 108 S. Ct. at 2803, and must be narrowly drawn. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607, 102 S. Ct. 2613, 2620, 73 L. Ed. 2d 248 (1982). Any intrusion on the right must be tailored precisely to fit the particular child witness. *Coy*, 108 S. Ct. at 2803. To protect the right to face-to-face confrontation, in evaluating the child, the court must first determine whether the source of potential trauma to the child is testimony in court or testimony in the defendant's presence.[16] Then the court can select the manner of testimony that best fits the individual child. There

15/ The variations in the state statutes are reviewed in the appendix, p. A-33.

16/ The trial court in the case at hand did just the reverse. Based on testimony by the mother and guardian ad litem and without ever examining the child, he determined that the child would not be deposed in her father's presence. The court then required the prosecution to present testimony in support of its motion to videotape the deposition. R 245.

are a number of alternatives less intrusive[17] than total exclusion of the defendant.[18]

"Society's need to prosecute accused abusers is no greater than its need to preserve the Constitution." *State v. Robinson*, 153 Ariz. 191, 735 P.2d 801, 814 (1987) (en banc). Petitioner's case presents an important opportunity for this Court to guide state courts and legislatures in their efforts to preserve the constitutional rights guaranteed to the accused while accommodating child witnesses.[19]

B. *In conflict with Coy, the Florida Supreme Court erroneously analyzed harmless error by considering only the tainted, unconfronted testimony and not the remaining evidence in the case.*

17/ The court may exclude spectators, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982); *State v. Cooper*, 291 S.C. 351, 353 S.E.2d 451, 455 n.1 (1987) (collecting statutes); or the child may be less traumatized in open court as opposed to the close quarters of chambers. *Commonwealth v. Willis*, 716 S.W.2d 224, 233 (Ky. 1986). Other less restrictive alternatives include allowing the presence of a supportive adult, *see Hochheiser v. Superior Court*, 161 Cal. App. 3d at 788, 208 Cal Rptr. at 279; *State v. Thomas*, 144 Wis. 2d 876, 425 N.W.2d 641, 643 (child testified from mother's lap); *State v. Cooper*, 291 S.C. 351, 353 S.E.2d at 453; statutes collected in the appendix, p. A-41, or the use of leading questions. Ala. Code Ann. § 15-25-1 (Michie Supp. 1988). Courts may deny continuances, limit questioning and voir dire, *Hochheiser*, 161 Cal. App. 3d at 791 n.9, 208 Cal. Rptr. at 282 n.9, or reduce the number of court appearances. *See Miller v. State*, 517 N.E.2d 64, 73 (Ind. 1987).

18/ At least two states allow the child to view the defendant on a television monitor during his or her testimony. Minn. Stat. Ann. § 595.02(4)(c)(2) (West Supp. 1989); Ohio Rev. Code Ann. § 2907.41(A)(2) (Page 1987). The Supreme Court of Ohio observed that such a provision is "somewhat less intrusive on a defendant's right of confrontation" than totally precluding the witness' awareness of the defendant's presence as was done in this case. *State v. Eastham*, 39 Ohio St. 3d 307, 530 N.E. 2d 409, 412 n.5 (1988) (per curiam). *See also State v. Tafoya*, 108 N.M. 1, 765 P.2d 1183, 1184 (Ct. App. 1988), *cert. denied*, 109 S. Ct. 1572 (1989) (witnesses aware that defendant could see them); *Hochheiser v. Superior Court*, 161 Cal. App. 3d at 788, 208 Cal. Rptr. at 280 (1984) (monitors in room with child showed defendant, judge, and examining attorney). The witnesses in *Coy* must have known that although the screen erected in the courtroom prevented them from seeing the defendant, he could see them, and the Iowa statute requires the court to inform them of this fact. *Coy*, 108 S. Ct. at 2806 n.2 (Blackmun, J., dissenting).

19/ As one court noted, legislators are politically motivated to vote in favor of statutes designed to make it easier to convict persons accused of child abuse and leave it to the courts to deal with the ramifications. *Commonwealth v. Haber*, 351 Pa. Super. 79, 505 A.2d 273, 275 n.1 (1986).

In holding that any error in denying Petitioner his right to face-to-face confrontation of the videotape was harmless, the Florida Supreme Court did not review the record evidence to determine whether the errors were harmless beyond a reasonable doubt. Instead, focusing solely and exclusively on the specific unconfronted evidence in issue - the child's videotaped testimony - the court held:

> Because the videotaped testimony was totally exculpatory, the admission of the testimony unquestionably did not contribute to the conviction and was harmless beyond a reasonable doubt.

Glendening, 536 So. 2d at 218. The Supreme Court of Florida's harmless error analysis directly conflicts with *Coy's* command that in assessing harmless error, the reviewing court can consider only "the remaining evidence," and not the testimony the accused was precluded from confronting face-to-face.

Although the Florida Supreme Court recited the correct rule in a footnote, *Glendening*, 536 So. 2d at 218 n.4, it failed to apply it. In direct conflict with *Coy*, the Florida Supreme Court analyzed the harmless error issue in this case by engaging in the "pure speculation" *Coy* prohibits. Its conclusion of harmlessness came after it impermissibly hypothesized that confrontation would have made no difference since the videotaped testimony was exculpatory. *Id.* at 218.

The total lack of literal confrontation in this case cannot be dismissed as harmless beyond a reasonable doubt. Although the child's videotaped testimony was exculpatory, the videotape procedure was prejudicial because it served as the only basis for admitting the child's inculpatory and devastating hearsay state-

ments.[20] Thus, the hearsay statements were admitted only because the statute allowed a procedure that deprived Petitioner of his literal right to face-to-face confrontation.

For this reason, it is impossible to separate the impact of the videotaping procedure from Petitioner's conviction. Without the child's videotaped testimony, her hearsay statements would not be admissible. The "remaining evidence" is not so overwhelming that Petitioner's guilt can be determined beyond a reasonable doubt. Indeed, in both the intermediate appellate court and the Florida Supreme Court, the State argued the Petitioner's conviction should be affirmed based on the remaining nonhearsay evidence in the record. Significantly, both Florida courts declined to affirm on this ground.[21]

The videotaping procedure also prejudiced Petitioner by diluting the effect of the child's testimony exonerating him.

20/ Although the prosecution never advanced the position at trial, the Florida Supreme Court held the hearsay was admissible on the theory that replaying the child's unconfronted videotaped testimony was constitutionally equivalent to her live, in court testimony at trial. *Glendening*, 536 So. 2d at 216. Absent this holding, there was no basis for admitting the incriminating hearsay. The only other possible constitutional basis for admitting the statements without violating *Ohio v. Roberts*, 448 U.S. 56 (1980), addressed *infra*, or the new Florida hearsay exception, § 90.803 (23)(a)(2)(b), was that the child was "unavailable" due to a risk of severe emotional harm. It is uncontested that unavailability was never shown.

21/ The "other evidence" on which the State relied, the medical testimony and the Petitioner's supposed admissions to two prison inmates, is seriously flawed. The medical evidence as to whether the offense even occurred was sharply in dispute and inconclusive at best. The State's medical expert, who had never before examined a child under anesthesia for rectal abuse, admitted that she could not say the child was injured as a result of penile penetration. R 1523. The defense's medical expert was experienced in rectal examinations and concluded there had been no abuse. R 1907-44. The child's regular pediatrician and her day care teacher did not observe anything unusual or any bowel or rectal problems in the child. R 1880-83. Also unreliable was the testimony of a prisoner, corroborated by his fellow prisoner, that Petitioner admitted the offense while incarcerated prior to trial. Although the prisoner was an eight-time convicted felon, the Petitioner was precluded at trial from fully cross-examining him regarding a possible improper sentencing deal that might have revealed bias and motive for his false testimony. R 2446-54. Moreover, the prisoners' testimony, even if believed, related to a period outside the time frame of the charges in this case. R 82, 1335, 1819-20. Finally, because the trustworthiness of a confession is suspect, it is not allowed into evidence without establishment of the *corpus delicti* of the crime by other evidence.

Substituting a videotape for live testimony affects the ability of the jury to assess the witness' testimony in an undefined and unpredictable manner. The camera may distort or exclude evidence that would be before the jury if the witness had appeared. *See Hochheiser,* 161 Cal. App. 3d at 786-87, 208 Cal. Rptr. at 278-79. Certainly, testimony videotaped outside the defendant's presence deprives the jury of the opportunity to see "the reaction of the witness to the physical presence of the accused," *Commonwealth v. Willis,* 716 S.W.2d 224, 234 (Ky. 1986) (Stephens, C.J., dissenting), and to see the defendant's reaction to the testimony. The jury is simply left to assume it would indicate guilt. Videotaping also provides the potential for abuse through "camera theatrics." *Strickland v. State,* 44 Crim. L. Rep. 2085 (Ala. 1988).

A final harmful effect of the videotaping procedure in this case is that it supported an inference of guilt. The juxtaposition of the child's unconfronted exculpatory videotaped testimony with the live presentation of her damaging hearsay statements through articulate adults created for the jury the improper impression that the child feared the Petitioner, making it impossible for him to get a fair trial. The procedure is especially damaging in cases such as this where the defendant is a relative of the child witness.

Ironically, in a post-*Coy* decision by the same intermediate Florida appellate court that affirmed Petitioner's conviction before *Coy* was issued, this precise conclusion was reached on identical facts. In *Jaggers v. State,* 536 So. 2d 321, 330 (Fla. 2d D.C.A. 1988), the defendant was convicted of the same sexual battery offense involved here. Exactly as in this case, the videotaped testimony of the complaining witnesses, the defendant's daughter and step-daughter, was favorable to the defense. Reversing the conviction in words that apply with equal force here, *Jaggers* stated:

> After all, these witnesses were appellant's daughter and step-daughter. By their protected videotaped testimony, they denied an essential element of the charges against appellant. Why then shield these witnesses from sight of appellant and thereby create a possible improper influence by inference on the jury that these children were

> afraid of their father? Does that inference of fear create in the jury a thought that the children may be falsely testifying under oath when they exonerated their father, but on the other hand, told the truth in their unsworn out of court statements? . . . By their verdict, that appears to be what the jury believed.

536 So. 2d at 330.

Properly analyzed under *Coy's* "remaining evidence" rule, the constitutional error in this case cannot be deemed harmless. Because the Florida Supreme Court's harmless error analysis directly conflicts with *Coy's,* certiorari should be granted.

II. ADMITTING OVER OBJECTION THE REPUDIATED HEARSAY STATEMENTS OF A THREE AND ONE-HALF YEAR OLD COMPLAINING WITNESS WHO DID NOT UNDERSTAND THE DIFFERENCE BETWEEN TELLING THE TRUTH AND TELLING A LIE CONFLICTED WITH *OHIO V. ROBERTS* AND THEREBY VIOLATED THE PETITIONER'S SIXTH AMENDMENT CONFRONTATION RIGHT.

It was uncontested and the trial judge specifically found in this case that the three and one-half year old complaining witness did not comprehend and was not able to distinguish between the "truth" and a "lie," did not understand the concept of "good or bad," and was "unable to articulate the difference between right and wrong or telling the truth or telling a lie." R 771-72, 778-79, 787. Nevertheless, and in spite of the agreement of the defense and the prosecution at trial that the child was *not* "competent to testify" under Florida law, the Florida Supreme Court affirmed the trial court's holding to the contrary.[22] *Glendening,* 536 So. 2d at 219. Because admitting the hearsay statements of a child who cannot comprehend and distinguish between telling

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22/ Under Florida law, a child witness is not competent to testify unless she "understands the duty to tell the truth or the duty not to lie." Fla. Stat. § 90.605(2) (1987). Although the Florida Supreme Court stated portions of the record supported a finding of competency, no such portions are presented in its opinion. 536 So. 2d at 219. The intermediate appellate court declined even to decide the issue. 503 So. 2d at 340.

the truth and telling a lie unavoidably conflicts with the reliability and trustworthiness requirements of this Court's decision in *Ohio v. Roberts,* 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), certiorari should be granted.

In *Roberts,* this Court held that when a hearsay declarant is not present for confrontation and cross-examination at trial,[23] the sixth amendment requires a showing that (1) the declarant is unavailable for trial and (2) the declarant's out-of-court statements bear sufficient "indicia of reliability" to provide the jury with an adequate basis for evaluating the truth. 448 U.S. at 62-66, 100 S. Ct. at 2536-39. The primary and critical consideration under the confrontation clause for determining the admissibility of hearsay is the reliability of the out-of-court statement. To that end, the focus of the Supreme Court has been to ensure that there "are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant." *Dutton v. Evans,* 400 U.S. 74, 89, 91 S. Ct. 210, 220, 27 L. Ed. 2d 213 (1970), *quoted in Ohio v. Roberts,* 448 U.S. at 65, 100 S. Ct. at 2539.

The only basis for admitting the child's hearsay statements in this case was Florida's new statutory child abuse hearsay excep-

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23/ Although the Florida Supreme Court held that for confrontation clause purposes the replaying of the child's unconfronted videotaped testimony was equivalent to her presence at trial under *Roberts* and the new Florida hearsay exception, *Glendening,* 536 So. 2d at 216-17, this conclusion cannot withstand scrutiny under *Coy.* The Florida Supreme Court's equivalency holding rests entirely on the misperception that the Petitioner's confrontation rights were fully protected so long as he had the opportunity to cross-examine the child when she was videotaped, even though he was at the time behind a two-way mirror and unable to confront her face-to-face. *Id.* at 217. This exact reasoning - that the right to face-to-face physical confrontation is not violated so long as there is an opportunity for cross-examination - was completely rejected by *Coy. Coy* underscores that the literal right to face-to-face physical confrontation at the time of trial, unlike other implicit rights for which exceptions have been created, such as cross-examination, is at the core of the values furthered by the confrontation clause. 108 S. Ct. at 2802-03. This is consistent with the principle implicit in *Ohio v. Roberts* that presence for cross-examination *at trial* means the witness has appeared live and in court, or, at a bare minimum, the defendant was able to physically confront the witness face-to-face when the previous statements were made. 100 S. Ct. at 2537-39.

tion. *Glendening,* 503 So. 2d at 336. Because no presumptively reliable "firmly rooted" hearsay exception applied, under *Roberts* the State was required to show reliability and particularized guarantees of trustworthiness before the statements could be allowed into evidence. 448 U.S. at 66, 100 S. Ct. at 2539.

The incriminating hearsay statements in issue in this case were made by a three and one-half year old child who, the trial court found, lacked any understanding of the concepts of truth and falsity, good and bad, and right and wrong. She also lacked the ability to distinguish between those concepts. Whether such a child is labeled "competent" or "incompetent" under state law, or indeed whether an individual state even requires its witnesses to be competent, the hearsay statements of such a child logically cannot possess the reliability and trustworthiness the confrontation clause demands. The Florida Supreme Court's holding to the contrary conflicts with the principle of *Ohio v. Roberts.*[24]

The trial judge's finding that the three and one-half year old lacked any understanding of truth or falsity was made on the eve of trial. Her incriminating hearsay statements had been uttered months earlier, when the child was younger and even less likely to have understood the difference between telling the truth and telling a lie. Additionally, when the hearsay statements were made, the child was in an environment where she was susceptible to leading and suggestive questioning. In contrast to the more neutral court-like setting of the competency hearing, where the child proclaimed the Petitioner's innocence in the presence of the judge and representatives for both sides, the damaging hearsay was elicited in closed interview sessions with social workers, police, and others. Under these circumstances, that the child possessed at least some understanding of truth and falsity was an absolute

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24/ *See* Frank, *Confronting Child Victims of Sex Abuse: The Unconstitutionality of the Sexual Abuse Hearsay Exception,* 7 U. Puget Sound L. Rev. 387, 397-98 (1984), which stated "The confrontation clause of the United States Constitution bars the admission of hearsay by testimonially incompetent children," and noted that corroboration of such hearsay will not insure trustworthiness. Relatedly, in considering the admissibility of hearsay statements by an incompetent child, the Montana Supreme Court recently identified the child's ability to differentiate truth and falsity as one of several factors to weigh. *State v. J.C.E.,* 767 P.2d 309, 315 (Mont. 1988).

necessity to assure her hearsay statements were trustworthy and reliable under *Roberts.*[25]

In a similar situation, the Supreme Court of Rhode Island reversed a child sex abuse conviction because the trial court admitted hearsay statements of a four year old who could not appreciate the concept of truthfulness and was testimonially incompetent under that state's law. *State v. Paster,* 524 A.2d 587 (R.I. 1987). Although the child in *Paster* was ruled incompetent, the reasoning of the case applies with equal force here. If a child witness cannot distinguish between truth and falsity, her trustworthiness and reliability cannot possibly be enhanced by having her tainted testimony presented second-handed to the jury by another person:

> If an infant is ruled incompetent at the time of trial because she is only four years old, assertions made by that infant a year earlier cannot be considered inherently more reliable. Logic dictates that, if anything, they are less reliable.

Id. at 590. The principle has been recognized in other states. *See State v. Segerberg,* 131 Conn. 546, 547-48, 41 A.2d 101, 103 (1945) (reversing child sex abuse conviction because trial court admitted hearsay statements of testimonially incompetent child);

25/ It has been recognized with increasing frequency that in the closed interviews between children and social workers or others, where much of the incriminating hearsay is elicited, the child is pressured and her responses are often the product of leading and suggestive questioning. The questioning is often biased and premised on the assumption that the abuse did in fact occur. *See* McIver, *The Case for a Therapeutic Interview in Situations of Alleged Sexual Molestation,* THE CHAMPION, Jan./Feb. 1986 at 11, 11-13. The interviewers have no motive to develop facts favorable to the accused, which calls into question the completeness of out-of-court statements they convey. Davis, *Confrontation and Hearsay Statements of Child Victims of Sexual Abuse,* Fla. B.J., Oct. 1988 at 33. The instant record indicates a significant likelihood that such flaws infected the interview and investigative process here. A social worker who provided critical incriminating hearsay testimony acknowledged that she was asked to "confirm" the allegations against the Petitioner. R 2037-38. Even the trial court observed that the incriminating hearsay responses to which the social worker testified lacked spontaneity and were mostly "yes" answers to questions posed by the social worker. The trial judge remarked that he could not interpret the child's incriminating answers as "yes" responses "other than [the social worker] saying that's a yes." R 1756.

Ketcham v. State, 240 Ind. 107, 162 N.E.2d 247 (Ind. 1959); *State v. Wilson,* 156 Ohio St. 526, 103 N.E.2d 552 (1952) (reversing conviction in child sex abuse case where deposition of child introduced without prior determination of child's competency).[26]

That the instant case involves the emotion-charged allegation of child sexual abuse heightens the necessity for scrupulous enforcement of *Roberts'* reliability and trustworthiness requirements. Merely because such charges are made "does not warrant admitting statements by an incompetent witness untested by cross-examination into evidence where the liberty of one charged with a serious crime hangs in the balance." *Paster,* 524 A.2d at 591 (citing *Ketcham v. State,* 240 Ind. at 113-14, 162 N.E.2d at 250).

The practical realities and frequent manipulation and misuse of child abuse prosecutions also compel strict enforcement of *Roberts'* criteria.[27] As this case vividly illustrates, notwithstanding the states' varying definitions of competency, before admitting a child declarant's hearsay statements, *Roberts'* reliability and trustworthiness requirement demands that she have at least some understanding of and appreciation for the concept of truthfulness and the difference between telling the truth and telling a lie. With an accusation so fraught with potential for abuse,

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26/ The necessity for a competent declarant has even been acknowledged in the civil setting. For example, in *Huff v. White Motor Corp.,* 609 F.2d 286, 293-94 (7th Cir. 1979), the Seventh Circuit held that where a declarant lacks the mental capacity to make a responsible statement, the declarant's hearsay statements lose all circumstantial guarantees of trustworthiness.

27/ A high percentage of reports of abuse are unfounded (65% according to Congressional testimony by the former director of the National Center on Child Abuse and Neglect), and a percentage of these (25% in an area near the Petitioner's home, *see Abusing the System,* Tampa Tribune, Sept. 7, 1987, at 10-A, col. 2) are knowingly false. Moreover, statistics indicate a large percentage of false child abuse accusations are brought by a parent in acrimonious marital circumstances, and that false charges are often a result of ulterior motives or the accusing parent's own personality disturbance. *See* Benesck & Schetsky, *Allegations of Sexual Abuse and Child Custody Cases,* Emerging Issues in Child Psychiatry and the Law, Spring 1985; Gordon, *False Accusations of Abuse in Child Custody Disputes,* New L.J., July 1985; Blodgett, *Coping With Child Abuse,* 73 A.B.A. J. 26 (May 1987). Significantly, in this case, the original suggestion of abuse came from the Petitioner's estranged wife, an admitted abuser of cocaine and marijuana. R 1335, 1371-75.

this much is a constitutional necessity.[28]

III. APPLYING FLORIDA'S NEW STATUTORY CHILD ABUSE HEARSAY EXCEPTION TO AN OFFENSE OCCURRING BEFORE ITS EFFECTIVE DATE TO ALLOW OTHERWISE INADMISSIBLE HEARSAY INTO EVIDENCE ON THE THEORY THAT UNCONFRONTED VIDEOTAPED TESTIMONY IS CONSTITUTIONALLY EQUIVALENT TO LIVE, CONFRONTED TESTIMONY AT TRIAL SUBSTANTIALLY DIMINISHED THE CONSTITUTIONAL RIGHT TO CONFRONTATION IN VIOLATION OF THE PROHIBITION AGAINST *EX POST FACTO* LAWS.

Based on its conclusion that the statute is merely procedural and does not affect substantial personal rights, the Supreme Court of Florida held that application of the new child abuse hearsay exception to Petitioner did not violate the constitutional prohibition against *ex post facto* laws.[29] *Glendening,* 536 So. 2d at 215. The Florida Supreme Court's classification of a statute that significantly diminishes an accused's constitutional right to confront the witnesses against him at trial as purely procedural conflicts in principle with this Court's *ex post facto* decisions.

A "seemingly procedural form," *Weaver v. Graham,* 450 U.S. 24, 29 n.12, 101 S. Ct. 960, 964 n.12, 67 L. Ed. 2d 17 (1981), will not save a statute from application of the *ex post facto* clauses.[30] Substance rather than form is determinative. As this Court noted long ago, "[e]very law that alters the legal rules of evidence, and receives less, or different testimony, than the law

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28/ Unfortunately, even when a defendant is vindicated, the effects of having been accused of child abuse linger on. Dunn, *Accusation Makes Life a Nightmare,* Tampa Tribune, Mar. 19, 1989, at 12-1, col. 4 (charges dismissed but house mortgaged and angry neighbors); Fla. Stat. Ann. § 415.504(4)(c) (West Supp. 1989) (unfounded reports maintained for one year, where abuse is indicated or confirmed report maintained for seven years).

29/ The sexual battery was alleged to have occurred between September 1, 1984, and June 24, 1985. R 82. The new statutory exception to Florida's hearsay rule became effective on July 1, 1985.

30/ U.S. Const., Art. I, § 9, cl. 3; Art. I, § 10, cl. 1.

required at the time of commission of the offense, in order to convict the offender," *Calder v. Bull,* 3 Dall. 386, 390, 1 L. Ed. 648 (1798), *quoted in Miller v. Florida,* ____ U.S. ____, 107 S. Ct. 2446, 2450, 96 L. Ed. 2d 351 (1987), violates the *ex post facto* prohibition. Such laws alter "substantial personal rights." *Beazell v. Ohio,* 269 U.S. 167, 171, 46 S. Ct. 68, 69, 70 L. Ed. 216 (1925).

This Court's decision in *Coy* makes clear that a defendant's right to literal face-to-face confrontation is a substantial personal right. It cannot be infringed unless necessary to further an important public policy. *Coy,* 108 S. Ct. at 2803. Although this Court has never recognized an exception to the confrontation right, by allowing into evidence the complaining witness' hearsay statements on the theory that her unconfronted videotaped testimony was equivalent to live, confronted testimony at trial, *Glendening,* 536 So. 2d at 216-17, the Supreme Court of Florida has now created one.

As a result, Florida's new statutory hearsay exception significantly diminished the Petitioner's constitutional right to confrontation, thereby operating to his serious detriment. Its retrospective application to the Petitioner, as candidly acknowledged by the intermediate appellate court's decision, made the offense "easier to prove." p. A-48, *infra.* When on rehearing the court was reminded that making an offense "easier to prove" was a prohibited *ex post facto* effect, it merely replaced the language in question with "simply authorized the introduction of additional evidence to demonstrate his guilt." 503 So. 2d at 337-38. This facile substitution, made by the state appellate court before this Court's *Coy* decision was announced, overlooked the serious detrimental impact of allowing the admission of hearsay evidence based on the declarant's testimony in the absence of face-to-face confrontation.

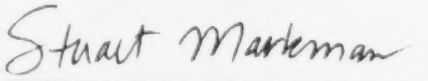
This Court should grant certiorari to correct this serious shortening of the reach of the *ex post facto* prohibition and to rectify the undermining of the right to face-to-face confrontation that unavoidably resulted.

CONCLUSION

Petitioner Glendening is now serving a life sentence because the Supreme Court of Florida resolved critical issues of national importance in ways that conflict with the right to face-to-face confrontation as recently articulated in *Coy v. Iowa,* the reliability and trustworthiness requirements of *Ohio v. Roberts,* and the line of cases prohibiting *ex post facto* application of the laws. Left uncorrected, the Florida Supreme Court's opinion will dramatically undermine those rights, not only in Florida but in all the jurisdictions now grappling with these difficult but crucial issues in the context of child abuse prosecutions.

Certiorari should be granted so that all jurisdictions will know that an exception to the core right to face-to-face confrontation cannot rest on the legislatively imposed presumption of trauma disapproved in *Coy,* even if a statute requires findings in support of that insufficient presumption. Certiorari should also be granted so that all jurisdictions will know that the hearsay statements of a three and one-half year old child who does not understand the difference between truth and falsity or good and bad cannot possess the trustworthiness and reliability required by *Ohio v. Roberts.* Finally, certiorari should be granted so that all jurisdictions will know that a statute that makes it easier to convict by creating the first known exception to the sixth amendment's literal right to face-to-face confrontation cannot be applied retroactively.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to the Office of the Attorney General, Suite 804, Park Trammel Building, 1313 Tampa Street, Tampa, Florida 33602 this 4th day of May, 1989.

Stuart Markman

Stuart C. Markman

APPENDIX

David Edward
GLENDENING, Appellant,

v.

STATE of Florida, Appellee.

No. 86-88.

District Court of Appeal of Florida,
Second District.

Jan. 14, 1987.

As Modified on Denial of Rehearing

March 6, 1987.

Defendant was convicted of sexual battery of child 11 years of age or younger, by the Circuit Court, Sarasota County, Andrew Owens, Jr., J., and defendant appealed. The District Court of Appeal, Grimes, J., held that: (1) statute which allowed admission of hearsay statements made by child sexual abuse victim did not violate defendant's state or federal right to confront adverse witnesses; (2) admission of out-of-court statements pursuant to statute which was enacted after alleged offense was committed did not constitute ex post facto application of law; (3) court substantially complied with statutory requirement that it make finding outside presence of jury that time, content, and circumstances of statement made by child sexual assault victim provided sufficient safeguards of reliability; (4) for purposes of statute, introduction of child's videotaped testimony was equivalent to her having personally testified; and (5) fact that child was unable to articulate difference between truth and lie did not render out-of-court statement concerning sexual abuse unreliable for admission under statute.

Affirmed.

1. Criminal Law 662.8

Statute which permitted admission of hearsay statements made by child victim of sexual abuse to third party in trial of alleged offender did not violate either state or federal constitutional guarantee to right to confront adverse witnesses, as statute only permitted admission of hearsay testimony if declarant was available for cross-examination at trial, or if found to be unavailable, statement had adequate indicia of reliability. West's F.S.A. § 90.803(23); West's F.S.A. Const. Art. 1, § 16; U.S.C.A. Const.Amend. 6.

2. Constitutional Law 199

Ex post facto law is one which either punishes an act which was innocently committed, makes punishment for offense more burdensome, or deprives accused of defense which was available when offense was committed.

3. Constitutional Law 202

Admission of hearsay testimony by child victim of sexual abuse against defendant at trial, pursuant to statute which was enacted after alleged offense occurred did not constitute ex post facto law, as allowing hearsay testimony into evidence did not increase punishment or deprive defendant of defense, and had no effect upon whether defendant committed a crime, but simply authorized introduction of additional evidence to demonstrate his guilt. West's F.S.A. § 90.803(23); West's F.S.A. Const. Art. 1, § 10; U.S.C.A. Const. Art. 1, § 10, cl. 1.

4. Criminal Law 681(1)

Court substantially complied with statutory requirement that court make finding in hearing conducted outside presence of jury that time, content and circumstances of hearsay statement provided sufficient safeguards of reliability as required by statute, which permitted introduction of hearsay evidence made by child sexual assault victim, where court announced findings when defendant objected to testimony by certain witnesses, though it did not announce findings after defendant made untimely objection or objected only to relevance rather than failure to abide by statutory procedure. West's F.S.A. § 90.803(23)(a)1.

5. Criminal Law 419(4)

Statute which allowed for hearsay testimony made by child victim of sexual assault to be admitted into evidence if child testified as witness or was unavailable was complied with, though child did not appear before jury, where child testified on videotape in presence of court, prosecutor, and defense counsel. West's F.S.A. § 90.803(23)(a)2.

6. Criminal Law 419(5)

Mere fact that child had been deemed incompetent to testify will not render his out-of-court statements concerning child abuse or sexual abuse unreliable for admission under statute which allows admission of hearsay statements made by child victim of sexual abuse. West's F.S.A. § 90.803(23).

Ronald K. Cacciatore, Tampa, for appellant.

Jim Smith, Atty. Gen., Tallahassee, and Kim W. Munch, Asst. Atty. Gen., Tampa, for appellee.

GRIMES, Judge.

This is an appeal from a conviction of sexual battery on a child eleven years of age or younger.

The major thrust of appellant's argument is that the court erred in admitting out-of-court statements made by Jennifer Glendening, the appellant's 3½ year-old daughter, which implicated appellant. The testimony concerning these statements could only have been admitted under section 90.803(23), Florida Statutes (1985). Appellant not only attacks the constitutionality of the statute and argues its inapplicability to him but also contends that there was no compliance with its requirements.

Section 90.803(23) reads as follows:

> (23) HEARSAY EXCEPTION; STATEMENT OF CHILD VICTIM OF SEXUAL ABUSE OR SEXUAL OFFENSE AGAINST A CHILD.—
>
> (a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing any act of child abuse, sexual abuse, or any other offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:

1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; and

2. The child either:

a. Testifies; or

b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to s. 90.804(1).

(b) In a criminal action, the defendant shall be notified no later than 10 days before trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the child's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.

(c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.

(1) In arguing facial unconstitutionality, appellant contends that section 90.803(23) violates the sixth amendment to the United States Constitution and article I, section 16, of the Florida Constitution, both of which guarantee an accused the right to confront adverse witnesses. However, the United States Supreme Court has held that the confrontation clause is satisfied when a declarant whose out-of-court statement is sought to be introduced is available for cross-examination at the trial or if found to be unavailable, the statement bears adequate "indicia of reliability." *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). Section 90.803(23) tracks the requirements

of *Ohio v. Roberts.*

Comparable statutes providing for the admissibility of out-of-court statements by child abuse victims have been held constitutional in other jurisdictions. *State v. Myatt,* 237 Kan. 17, 697 P.2d 836 (1985); *State v. Bellotti,* 383 N.W.2d 308 (Minn.Ct. App.1986); *State v. Ryan,* 103 Wash.2d 165, 691 P.2d 197 (1984).

> The statute is intended to allow the courts to be sensitive to the critical need for a child victim's out-of-court statements, while allowing them to address the various reliability problems posed by the statements, thus protecting the defendant's confrontation rights.

697 P.2d at 842. We hold that section 90.803(23) does not violate the confrontation clauses of the United States and Florida Constitutions.

[2, 3] Appellant also argues that since he was charged with a criminal offense occurring between September 1, 1984, and June 24, 1985, the provisions of section 90.803(23) cannot be employed against him because the statute did not become effective until July 1, 1985. He contends that the admission of the out-of-court statements which are covered by that statute constituted an ex post facto application of the law. An ex post facto law is one which either punishes an act which was innocent when committed, makes the punishment for the offense more burdensome, or deprives the accused of a defense which was available when the offense was committed. *Dobbert v. Florida,* 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344, *rehearing denied,* 434 U.S. 882, 98 S.Ct. 246, 54 L.Ed.2d 166 (1977). Clearly, section 90.803(23) did not increase the punishment or deprive appellant of a defense. Moreover, the statute had no effect upon whether appellant committed the crime but simply authorized the introduction of additional evidence to demonstrate his guilt. *State v. Ryan.* Thus, section 90.803(23) as applied to appellant did not violate article I, section 10, of the United States and Florida Constitutions.

Finally, appellant argues that even under the statute, the court erred in permitting several witnesses to testify that Jennifer had made prior statements to them concerning the misconduct with which he was charged. In order to address this point, it is first necessary to discuss certain matters which took place during the progress of the case.

Prior to trial, the state served a motion to video tape Jennifer's testimony for introduction at trial pursuant to section 92.53, Florida Statutes (1985). After hearing evidence on the motion and making the requisite finding that there was substantial likelihood that Jennifer would suffer at least moderate emotional or mental harm if she were required to testify in open court, the court entered an order permitting the video taping and requiring appellant to view the testimony outside Jennifer's presence.

At the video taping session, the court first conducted a voir dire examination of the child to determine her competency to testify. The court concluded that she was competent because she showed an above average intelligence for a 3½ year-old and was aware of her surroundings. The court attributed her inability to explain the difference between the truth and a lie to the inartful questioning by the court and the state attorney. Thereafter, when the child was interrogated concerning the matters involved in the case, she did not implicate her father in any misconduct. As a consequence, appellant did not object to the introduction of the video tape into evidence at the trial and, in fact, caused it to be replayed as part of his defense. Hence, there is no contention on appeal over the admissibility of the video tape. However, the fact that the video tape was authorized and played at the trial is relevant to our subsequent discussion.

About a month before trial, appellant made a motion to exclude all hearsay statements made by the child. The state filed a response in which it enumerated the various hearsay statements it intended to introduce. The court ruled that the state's response did not constitute adequate compliance with the notice requirements of section 90.803(23) and permitted the state to file a more detailed response. Thereafter, but more than ten days before trial, the state filed a detailed recitation of the out-of-court statements to be offered at trial in order to comply with the notice mandated by section 90.803(23)(b). At a subsequent hearing, the court observed that it could not rule upon the admissibility of such statements without actually hearing the witnesses' testimony concerning the circumstances under which the child's statements were made.

Dr. Linda Boczar was the first of the witnesses listed on the notice who testified. However, appellant cannot now complain about her testimony because his counsel stated at the trial that he had no objection to her stating what Jennifer had told her.

The next of the disputed witnesses was Rebecca Winkel, a coordinator for the child protection team. Ms. Winkel testified concerning the circumstances under which the child made incriminating statements about her father and the content of such statements. Except for an initial objection on grounds of corpus delicti, the appellant did not object to this testimony until after it was given. At this point, appellant objected on hearsay grounds, whereupon the court asked the jury to be removed and made the following statement on the record:

> THE COURT: At this time Mr. Dirmann had raised an objection concerning the hearsay exception to some of the testimony by Mrs. Winkel. The court would feel that the objection has been waived in view of the timing of the objection but in an abundance of caution and in view of the fact that we're all operating under a brand new legislative enactment, which only came into effect this year, amending section 90.803 and allowing, making an exception of children or child victim statements of sexual abuse, which requires the court to have a hearing conducted outside the presence of the jury as to the time, content and circumstances of the statement providing sufficient safeguards of reliability in making the determination. The court has heard the testimony of Mrs. Winkel concerning the doll interview. Based upon the testimony presented by Mrs. Winkel here under oath the court would find as to the time, I'm not certain of the exact time but there was certainly no coercion of the child, that the interview was conducted with a period of play where the child became familiar with the interviewer and that she was not prompted by the interviewer in the use of the dolls and describing these alleged sexual acts. The court would find that the content and the circumstances surrounding the statement under these circumstances would provide sufficient safeguards of reliability to allow the admission of that testimony as an exception to the hearsay rule under subsection 23.

The third witness to testify concerning what Jennifer had told her was Detective Barber. When the appellant objected on grounds of hearsay and of relevance to section 90.803(23), the court listened to a proffer of her testimony outside the presence of the jury. The court then ruled that because the child's statement to Detective Barber was not a direct reference to child abuse or sexual abuse, Detective Barber could not testify unless the state could demonstrate that the child's statement was relevant to prov-

ing that appellant was guilty of such misconduct. Later in the trial the state introduced other evidence which showed how Jennifer's statement to Detective Barber was relevant to prove that Jennifer's father had sexually abused her. Thereupon, the court permitted Detective Barber to state what the child had told her.

The last witness who testified concerning the child's statements was Ruth Shapiro, a social worker at the Suncoast Mental Health Center. At the outset, the court conducted a hearing outside the presence of the jury to determine whether Ms. Shapiro could testify concerning the child's hearsay statements. Ms. Shapiro was interrogated at length concerning the content of the statements and the circumstances under which they were made. The court excluded certain statements and ruled that others could be admitted since they met the standards of section 90.803(23).

[4] In regard to the argument that the requirements of the statute were not followed, appellant first contends that the court failed to make a finding "in a hearing conducted outside the presence of the jury that the time, content and circumstances of the statement provide sufficient safeguards of reliability" as required by section 90.803(23)(a)1. With respect to Ms. Winkel, we concur with the court's conclusion that appellant's hearsay objection was untimely. In any event, at the point the objection was made, the court then removed the jury and made the requisite findings predicated upon the testimony which had already been presented.

When the state recalled Detective Barber to the stand, appellant did not object on grounds of hearsay, as such, but only argued relevancy. By this time, however, the state had demonstrated how the child's statement was directly related to the contention that her father had abused her, and the court properly rejected appellant's argument on this issue. The court was obviously satisfied with the credibility of the child's statements to Detective Barber because the detective had previously testified outside the presence of the jury. The court cannot be faulted for failing to announce the findings specified by section 90.803(23)(a)1. when appellant was then only arguing relevance and was making no objection to the procedure being followed.

Significantly, appellant does not assert that the court did not comply with the procedural aspects of section 90.803(23) with respect to Ms. Shapiro's testimony. By the time Ms. Shapiro testified, everyone had become familiar with the intricacies of

the statute. Her testimony was first proffered outside the presence of the jury. There was ample evidence to support the court's finding that Jennifer's out-of-court statements made to Ms. Shapiro were reliable.

[5] Appellant further argues that even if the court substantially complied with the requirements of subparagraph 1. of section 90.803(23)(a), the court made no finding whatsoever with respect to subparagraph 2. which requires that the child either testify or be unavailable as a witness. Appellant notes that in order to be declared unavailable for purposes of this subparagraph, the child would have to meet the definition of unavailability under section 90.804(1) or the court would have to conclude that the child's participation in the trial would result in "a substantial likelihood of severe emotional or mental harm." We cannot sustain the state's response that the hearing previously conducted for the purpose of deciding whether to permit the child's testimony to be video taped would suffice. Aside from the fact that the hearing was held for a different purpose, the standard for permitting video taping is whether the child would suffer at least moderate emotional or mental harm, whereas a finding of unavailability is predicated upon a substantial likelihood of severe emotional or mental harm. Notwithstanding, we believe that it was unnecessary that the court make a finding of unavailability in this case because the child did, in fact, testify. Her testimony was taken before the court with participation by both attorneys just as it would have been had the child been physically present at trial. Appellant was in a position to cross-examine her concerning the out-of-court statements because the state's notice for introduction of these statements had already been filed. Therefore, we hold that for purposes of section 90.803(23)(a)2., the introduction of Jennifer's video tape was equivalent to her having personally testified.

[6] Finally, appellant also contends that the court's findings that Jennifer's statements were reliable cannot be sustained because it was demonstrated in her video taped testimony that she was unable to articulate the difference between the truth and a lie, an essential element of the traditional test for determining the competency of a witness of tender years. *Bell v. State,* 93 So.2d 575 (Fla.1957). See § 90.605(2), Fla.Stat. (1985). It is difficult to see how appellant can rely on Jennifer's testimony to demonstrate unreliability when he caused the video tape to be replayed as part of his own case. In any event, we do not need to reach the question of whether the court correctly concluded

that Jennifer was competent to testify because this is not the criterion for the introduction of hearsay statements under section 90.803(23). The mere fact that a child has been deemed incompetent to testify will not render his out-of-court statements concerning child abuse or sexual abuse unreliable for admission under section 90.803(23). *See State v. Superior Court,* 149 Ariz. 397, 719 P.2d 283 (Ct.App.1986); *State v. Myatt; State v. Bellotti; State v. Campbell,* 299 Or. 633, 705 P.2d 694 (1985); *Contra State v. Ryan.* The record adequately supports the court's conclusion that Jennifer's out-of-court statements were sufficiently reliable for introduction into evidence.

Appellant's other points on appeal are without merit.

Affirmed.

DANAHY, C.J., and HALL, J., concur.

David Edward GLENDENING, Petitioner,

v.

STATE of Florida, Respondent.

No. 70346.

Supreme Court of Florida.

Dec. 1, 1988.

Rehearing Denied Feb. 3, 1989.

Defendant was convicted of sexual battery of child 11 years of age or younger, by the Circuit Court, Sarasota County, Andrew Owns, Jr., J., and he appealed. The District Court of Appeal, 503 So.2d 335, Grimes, J., affirmed, and defendant applied for review. The Supreme Court, Ehrlich, C.J., held that: (1) statute allowing admission of hearsay statements of children regarding sexual abuse was constitutional; (2) application of statute to defendant did not violate prohibition against ex post facto laws; (3) allowing child's testimony to be video taped did not violate defendant's right of confrontation; (4) judge was not required to determine whether child was testimonially competent prior to allowing admission of hearsay statements; (5) admission of expert testimony that defendant was person who sexually abused victim was not fundamental error; and (6) defendant waived issue of whether expert improperly vouched for credibility of hearsay declarant.

Affirmed.

Overton, J., concurred in result only.

1. Criminal Law 662.8

Statute which allowed admission of hearsay statements by children concerning sexual abuse did not violate confrontation clause; in order for statements to be admitted court was first required to find, in a hearing, that time, content, and circumstances of statement provided sufficiency of guards of reliability and child must either testify or be unavailable as a witness. West's F.S.A. § 90.803(23); U.S.C.A. Const. Amend. 6; West's F.S.A. Const. Art. 1, § 16.

2. Constitutional Law 202

Infants 12

Application at trial of statute which allowed admission of hearsay statements made by children regarding sexual abuse, which statute was not in effect at time of offense, did not violate prohibition against ex post facto laws; statute did not effect crime with which defendant was charged, punishment prescribed therefore, or quantity or degree of proof necessary to establish guilt. West's F.S.A. § 90.803(23); U.S.C.A. Const. Art. 1, §§ 9, cl. 3, 10, cl. 1.

3. Infants 20

Videotaped testimony of child sexual abuse victim was "testimony" under statute allowing admission of hearsay statements by children regarding sexual abuse when child testifies. West's F.S.A., §§ 90.803(23), 92.53(1).

See publication Words and Phrases for other judicial constructions and definitions.

4. Criminal Law 662.1

Allowing child sexual abuse victim's testimony to be videotaped and shown to jury rather than given live in open court did not violate defendant's right to confront witness; evidence showed that child would have suffered emotional and mental harm had the child been forced to testify in court, and defendant was permitted to watch testimony behind two-way mirror and conduct full cross-examination of child. U.S.C.A. Const.Amend. 6; West's F.S.A. Const. Art. 1, § 16; West's F.S.A. §§ 90.803(23), 92.53(4).

5. Criminal Law 1168(2)

Child sexual abuse victim's testimony did not implicate defendant in any wrongdoing, and child specifically stated that defendant had not hurt her, rendering testimony totally exculpatory, and thus any error in denying defendant opportunity to confront child witness face-to-face was harmless beyond a reasonable doubt. U.S.C.A. Const.Amend. 6; West's F.S.A. Const. Art. 1, § 16.

6. Infants 20

Even if child sexual abuse victim's videotaped testimony was not "testimony" under statute allowing admission of hearsay statements of children regarding sexual abuse when child testifies and, requiring other corroborative evidence of abuse when child does not testify, child's hearsay statements were sufficiently corroborated by medical testimony and by two witnesses that testified that defendant admitted to them that he committed the sexual abuse. West's F.S.A. § 90.803(23).

7. Infants 20

Trial judge was not required to determine that child sexual abuse victim was competent to testify in order to allow, under evidence statute, admission of hearsay statements made by child concerning sexual abuse, but rather was only required to determine that statements were trustworthy and reliable. West's F.S.A. § 90.803(23).

8. Criminal Law 469

Qualified expert in interviewing child sexual abuse victims was entitled to express opinion on issue of whether child had been sexually abused. West's F.S.A. §§ 90.702, 90.703.

9. Criminal Law 469

Qualified expert in interviewing child sexual abuse victims was not entitled to give opinion as to whether defendant was child's abuser, and admission of such testimony was error. West's F.S.A. §§ 90.403, 90.702, 90.703.

10. Criminal Law 1036.6

Any error in admission of testimony of child sexual abuse expert that defendant was person who sexually abused victim was not fundamental error, and because defendant did not object to testimony or move to strike, court would not consider propriety of remark on appeal. West's F.S.A. § 90.403.

11. Criminal Law 1043(3)

Defendant's objection to expert testimony as irrelevant did not preserve for appeal issue of whether testimony had effect of

improperly vouching for credibility of hearsay declarant.

Stuart C. Markman of Winkles, Trombley, Kynes & Markman, P.A., Tampa, and Ronald K. Cacciatore, P.A., Tampa, for petitioner.

Robert A. Butterworth, Atty. Gen., and Katherine V. Blanco and Kim W. Munch, Asst. Attys. Gen., Tampa, for respondent.

EHRLICH, Chief Justice.

We have for review *Glendening v. State*, 503 So.2d 335 (Fla.2d DCA 1987), in which the district court expressly declared valid section 90.803(23), Florida Statutes (1985). We have jurisdiction. Art. V, § 3(b)(3), Fla. Const.

On July 26, 1985, Glendening was charged by information with sexual battery upon a child eleven years of age or younger, in violation of section 794.011(2), Florida Statutes (1985). The acts upon which the charge was based were alleged to have occurred between September 1, 1984 and June 24, 1985. The alleged victim was Glendening's three-and-one-half-year-old daughter.

Glendening was found guilty of the charged offense and received a life sentence with a mandatory minimum twenty-five years of incarceration. On appeal, the Second District Court of Appeal affirmed Glendening's conviction and sentence, rejecting the arguments that the trial court erred in admitting out-of-court statements made by the young victim under section 90.803(23), Florida Statutes (1985).

Glendening now seeks review of the decision of the Second District Court of Appeal. As the district court below noted, the major thrust of Glendening's argument involves the constitutionality of section 90.803(23), its applicability to his case, and compliance with the section's requirements. Section 90.803(23) is a hearsay exception which permits, under certain circumstances, the introduction of out-of-court statements made by a child victim of sexual abuse describing any act of child abuse, sexual abuse, or any other offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, if the child has a physical, mental, emotional, or developmental age of eleven or less.

[1] We first reject Glendening's contention that section 90.803(23) is unconstitutional on its face. Glendening relies upon the arguments set forth in the brief of Petitioner Perez filed in the case of *Perez v. State,* Case No. 70,027 in regard to this issue. We rejected these arguments in our decision in *Perez v. State,* 536 So.2d 206 (Fla.1988), released simultaneously with the present decision.

We next address Glendening's argument that because he was charged with an offense occurring before the effective date of section 90.803(23), application of the new hearsay exception to his case violated the prohibition against *ex post facto* laws. The United States Supreme Court has stated that there has been no attempt to precisely delimit the scope of the phrase "*ex post facto* law." One statement of the characteristics of an *ex post facto* law set forth by the Supreme Court, however, provided that " 'any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto.* ' " *Dobbert v. Florida,* 432 U.S. 282, 292, 97 S.Ct. 2290, 2297, 53 L.Ed.2d 344 (1977) (quoting *Beazell v. Ohio,* 269 U.S. 167, 169-70, 46 S.Ct. 68, 69, 70 L.Ed. 216 (1925)). Another formulation, reiterated recently in *Miller v. Florida,* also provides that " '[e]very law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender' " violates the prohibition against *ex post facto* laws. 482 U.S. 423, 107 S.Ct. 2446, 2450, 96 L.Ed.2d 351 (1987) (quoting *Calder v. Bull,* 3 U.S. (Dall.) 386, 1 L.Ed. 648 (1798)). No *ex post facto* violation occurs if a change is merely procedural and does not alter "substantial personal rights." *Miller,* 107 S.Ct. at 2451; *Dobbert,* 432 U.S. at 293, 97 S.Ct. at 2298.

Relying primarily upon that portion of the formulation of the scope of *ex post facto* laws from *Miller* which is set forth above, Glendening contends that section 90.803(23) alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offense. He further contends that because he was disadvantaged by the retrospective application of the exception, admission of the out-of-court statements of the child victim pursuant to section 90.803(23) in his case violated the prohibition against *ex post facto* laws. We disagree.

The proscription against laws which affect the legal rules of evidence and receive less, or different, testimony in order to convict the offender has been construed as prohibiting those laws which " 'change the ingredients of the offence or the ultimate facts necessary to establish guilt.' " *Miller,* 107 S.Ct. at 2453 (quoting *Hopt v. Utah,* 110 U.S. 574, 590, 4 S.Ct. 202, 210, 28 L.Ed. 262 (1884)). Changes in the admission of evidence have been held to be procedural. Two examples of this, noted in *Dobbert,* are found in *Hopt* and *Thompson v. Missouri,* 171 U.S. 380, 18 S.Ct. 922, 43 L.Ed. 204 (1898). In *Hopt,* the law in effect on the date of the alleged homicide provided that a convicted felon could not be called as a witness. Prior to trial of the case, the law was changed and a convicted felon, called to the stand to testify, implicated Hopt in the crime. The Supreme Court rejected the argument that the law was *ex post facto,* stating that "[a]ny statutory alteration of the legal rules of evidence which . . . only removes existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only" and "are not *ex post facto* in their application to prosecution for crimes committed prior to their passage." 110 U.S. at 589, 590, 4 S.Ct. at 209-10. In *Thompson,* the Missouri Supreme Court reversed Thompson's conviction of murder because of the inadmissibility of certain evidence. Letters written by the defendant to his wife were submitted for handwriting comparison, which was prohibited by the rules of evidence. Prior to the second trial, the law was changed to make this objectionable evidence admissible and Thompson was again convicted. The United States Supreme Court rejected the argument that this change was violative of the *ex post facto* clause and held that the change was procedural. *See Dobbert,* 432 U.S. at 293, 97 S.Ct. at 2298.

[2] The same reasoning which resulted in the Supreme Court's determination that the statutes in *Hopt* and *Thompson* were procedural leads to the conclusion that section 90.803(23), Florida Statutes, is also procedural and that the statute does not affect "substantial personal rights." As in *Hopt,* "[t]he crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by" the enactment of section 90.803(23). 110 U.S. at 589-90, 4 S.Ct. at 209-10. As in *Thompson,* section 90.803(23) "left unimpaired the right of the jury to determine the sufficiency or effect of the evidence declared to be admissible, and did not disturb the fundamental rule that the state . . . must overcome the presumption

of his innocence, and establish his guilt beyond a reasonable doubt." 171 U.S. at 387, 18 S.Ct. at 924. Accordingly, we conclude that the district court below correctly held that application of section 90.803(23) in the present case does not violate the prohibition against *ex post facto* laws.

The third issue addressed concerns compliance with the requirements of section 90.803(23) in the trial court below. Prior to trial, the state served a motion to videotape the child's testimony for introduction at trial pursuant to section 92.53, Florida Statutes (1985). Section 92.53 provides that upon

> a finding that there is a substantial likelihood that a victim or witness [in a sexual abuse or child abuse case] who is under the age of 16 would suffer at least moderate emotional or mental harm if he were required to testify in open court or that such victim or witness is otherwise unavailable as defined in s. 90.804(1), the trial court may order the videotaping of the testimony of the victim or witness in a sexual abuse case or child abuse case, whether civil or criminal in nature, which videotaped testimony is to be utilized at trial in lieu of trial testimony in open court.

The trial court heard evidence on the motion and found that there was a substantial likelihood that the child would suffer at least moderate emotional or mental harm if she were required to testify in open court. The trial court accordingly entered an order permitting the videotaping and required Glendening to view the testimony outside the child's presence.

At the videotaping session, the trial court first conducted a voir dire examination of the child to determine her competency to testify. The trial court concluded that the child was competent to testify because she showed an above average intelligence for a three-and-one-half-year-old child and was aware of her surroundings, attributing her inability to explain the difference between the truth and a lie to the inartful questioning by the court and the state attorney. Thereafter, when the child was interrogated concerning the matters involved in the case, she did not implicate her father in any misconduct.

Glendening made a pretrial motion to exclude all hearsay statements made by the child. In response, the state filed a notice of the various hearsay statements it intended to introduce. The trial court ruled that the state's response did not constitute ade-

quate compliance with the notice requirements of section 90.803(23)(b) and permitted the state to file a more detailed response. Thereafter, but more than ten days before trial, the state filed a detailed recitation of the hearsay statements to be offered at trial. At a subsequent hearing on the motion, the trial court observed that it could not rule upon the admissibility of the hearsay statements without hearing the witnesses' testimony concerning the circumstances under which the child's statements were made.

At trial, the witnesses listed on the state's notice testified concerning the out-of-court statements made by the child and the circumstances under which the statements were made. The videotape of the child's testimony was shown to the jury once during the state's case-in-chief and then again by the defense.

Glendening raises several arguments in regard to the compliance with section 90.803(23) by the trial court. Glendening contends that the requirements of section 90.803(23)(a)(2) were not met. This subsection provides that in order to admit the hearsay statements of a child under this exception, the child must either (a) testify, or (b) be unavailable. If the child is unavailable, the statute also requires other corroborative evidence of the abuse or offense. Glendening argues the district court below erred in holding that introduction of the videotaped testimony of the child, taken pursuant to section 92.53, was sufficient to satisfy the requirement that the child testify in order to admit the child's hearsay statements. We reject this argument.

[3] Section 92.53(1) provides that when the requisites of the statute are met, the trial court may order "the videotaping *of the testimony* of the victim or witness . . . which videotaped *testimony* is to be utilized at trial *in lieu of trial testimony in open court.*" (Emphasis added.) The statute clearly provides that videotaped testimony is the equivalent of testimony in open court. Moreover, the legislative intent in enacting section 92.53 was to spare children, to the extent constitutionally permissible, the trauma of testifying in open court.[1] The legislative intent would be defeated if section 92.53 did not have the effect of allowing the videotaped testimony of children meeting the requirements

1. *See* ch. 85-53, Laws of Fla.: "WHEREAS, it is necessary that safeguards be instituted for the children of the State of Florida who are victimized to assure that their right to be free from emotional harm and trauma occasioned by judicial proceedings is protected by the court. . . ."

of the statute where the laws of the state refer to "testimony" or "testifying."

[4] Application of section 92.53 to permit videotaping the child's testimony instead of requiring the child to testify in open court for purposes of admitting the child's out-of-court statements pursuant to section 90.803(23) does not violate the federal or Florida constitutional guarantee of the right of confrontation.[2] The defendant is permitted full cross-examination of the child, which is the functional purpose of the confrontation clause. *Kentucky v. Stincer,* 482 U.S. 730, 107 S.Ct. 2658, 2664, 96 L.Ed.2d 631 (1987). The jury is still able to see the witness as the testimony is given and "judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox v. United States,* 156 U.S. 237, 242-43, 15 S.Ct. 337, 339, 39 L.Ed. 409 (1895). The fact that Glendening was required to view the child's testimony from behind a two-way mirror as it was videotaped does not change the conclusion.[3] In the present case, Glendening was accompanied by counsel behind the two-way mirror and was able to communicate with counsel questioning the child if the need arose. His opportunity to engage in full and effective cross-examination was not interfered with by his exclusion. *See, e.g., Stincer,* 107 S.Ct. at 2663-64 n. 9.

Furthermore, although the confrontation clause does reflect a *preference* for face-to-face confrontation at trial, *Ohio v. Roberts,* 448 U.S. 56, 63, 100 S.Ct. 2531, 2537, 65 L.Ed.2d 597 (1980), the Supreme Court has recognized that

> competing interests, if "closely examined," *Chambers v. Mississippi,* 410 U.S., [284,] at 295, 93 S.Ct., [1038,] at 1045, [35 L.Ed.2d 297] may warrant dispensing with confrontation at trial. See *Mattox v. United States,* 156 U.S., [237,] at 243, 15 S.Ct. [337,] at 340 [, 39 L.Ed. 409] ("general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the

2. U.S. Const. amend. VI; art. 1, § 16, Fla. Const.

3. Section 92.53(4) provides that [t]he court may require the defendant to view the testimony from outside the presence of the child by means of a two-way mirror or another similar method that will ensure that the defendant can observe and hear the testimony of the child in person, but that the child cannot hear or see the defendant. The defendant and the attorney for the defendant may communicate by any appropriate private method.

> case"). Significantly, every jurisdiction has a strong interest in effective law enforcement, and in the development and precise formulation of the rules of evidence applicable in criminal proceedings.

Id. at 64, 100 S.Ct. at 2538. We agree with the First District Court of Appeal that "[w]eighing the competing interests in the balance . . . the defendant's right to confront his accusers must give way to the State's interest in sparing child victims of sexual crimes the further trauma of in-court testimony." *Chambers v. State,* 504 So.2d 476, 477-78 (Fla. 1st DCA 1987). Our conclusion is not altered by the recent United States Supreme Court decision in *Coy v. Iowa,* ___ U.S. ___, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988), which was issued subsequent to oral argument in the present case. Coy was charged with sexually assaulting two thirteen-year-old girls while they were camping out in the backyard of the house next door to him. Neither of the girls was able to describe their assailant's face. At trial, the girls were permitted to testify behind a large screen which enabled Coy to dimly perceive the witnesses but because of which the witnesses were completely unable to see Coy. *See* Iowa Code § 910A.14 (1987). The United States Supreme Court found that Coy's constitutional right to face-to-face confrontation was violated and reversed the judgment of the Iowa Supreme Court which had affirmed his convictions and sentences.

There are two reasons why the decision in *Coy* does not alter our conclusion. First, the present case is distinguishable from the scenario in *Coy*. In *Coy,* the Supreme Court recognized that "[i]t is true that we have in the past indicated that rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests." 108 S.Ct. at 2802. The majority opinion notes that any such exception to the right of face-to-face confrontation will only be allowed when necessary to further an important public policy. The majority then concludes that whatever exceptions may exist, the exception set forth in the Iowa statute could not be sustained by any conceivable exception. Iowa's argument that a necessity for an exception was established by the statute, which creates a legislatively imposed *presumption* of trauma, was rejected because the exception was not a firmly rooted exception and "there have been no individualized findings that these particular witnesses needed special protection." *Id.* at 2803.

In contrast to the statute at issue in *Coy,* section 92.53

requires an individual determination for each child witness that the use of videotaped testimony is necessary to prevent the child from suffering emotional or mental harm. In the present case, the trial court conducted a hearing on the issue of whether the child victim would suffer at least moderate emotional or mental harm if required to testify in open court. The child's mother and the child's guardian ad litem testified that the child had expressed a fear of seeing her father and described behavior of the child on various occasions to support their conclusions. In addition, Dr. Meyer, a pediatrician who had attempted to examine the child, and Ms. Shapiro, a social worker who works with sexually abused children, testified that based upon their experience with this particular child testifying in open court would be a terrifying experience, particularly if she were to be cross-examined with her father in the room. Both Dr. Meyer and Ms. Shapiro felt that examining the child by way of videotaping where she was not able to see her father would minimize her emotional trauma. Based upon this testimony, the trial judge concluded that there was a substantial likelihood that the victim would suffer at least moderate emotional or mental harm if required to testify in open court in the presence of the defendant. Thus, contrary to the facts in *Coy,* the present case involved "a case-specific finding of necessity." *Coy,* 108 S.Ct. at 2805 (O'Connor, J., concurring). Moreover, as noted previously, the protection of child witnesses from the trauma of testifying in open court in the presence of the defendant, when it is demonstrated that there is a substantial likelihood that such trauma would result, is a public policy of such importance as to justify a trial procedure that calls for something other than face-to-face confrontation. *See id.*

[5] Second, Justice Scalia recognized in the majority opinion in *Coy* that the United States Supreme Court has "recognized that other types of violations of the Confrontation Clause are subject to that harmless error analysis . . . and [has] see[n] no reason why denial of face-to-face confrontation should not be treated the same."[4] 108 S.Ct. at 2803. We conclude that if the denial of face-to-face confrontation in the present case had

4. Justice Scalia went on to note that "[a]n assessment of harmlessness cannot include consideration of whether the witness's testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation; such an inquiry would obviously involve pure speculation, and harmlessness must therefore be determined on the basis of the remaining evidence." *Coy v. Iowa,* _____ U.S. _____, 108 S.Ct. 2798, 2803, 101 L.Ed.2d 857 (1988).

been error, any error would have been harmless. When questioned, the child not only did not implicate the defendant in any wrongdoing, but specifically stated that he had not hurt her. Following this testimony by the child during examination by the state, defense counsel declined to conduct cross-examination of the child. Moreover, this exculpatory tape was presented to the jury by the defense during its case. Because the videotaped testimony was totally exculpatory, the admission of the testimony unquestionably did not contribute to the conviction and was harmless beyond a reasonable doubt. *State v. DiGuilio,* 491 So.2d 1129, 1138 (Fla.1986).

Accordingly, we conclude the district court below correctly held that introduction of the child's videotaped testimony, taken pursuant to section 92.53, satisfied the requirement of section 90.803(23)(a)(2) that the child either testify or be unavailable. *Accord State v. Sheppard,* 197 N.J.Super. 411, 484 A.2d 1330 (Law Div.1984) (Child victim would be permitted to testify through use of video equipment in prosecution of child's stepfather for sexual assault, despite resulting lack of eye contact between child witness and defendant where defendant, judge, jury, and spectators would see and hear the child clearly, adequate opportunity for cross-examination would be provided, and in view of trial court's finding of harm to the child if she was required to testify in open court.).

[6] Even if we had agreed with Glendening's argument that if the child testifies via videotape rather than in open court, the child's out-of-court statements could not be admitted without first imposing the additional safeguards under the *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), unavailable declarant scenario, it would be of no consequence in our review of the present case. The *Roberts* unavailable declarant scenario requires that if the declarant is unavailable, the hearsay must be marked with particularized guarantees of trustworthiness in order to be admissible. *Id.* at 65, 100 S.Ct. at 2538. Section 90.803(23) incorporates this requirement by requiring that there be other corroborative evidence of the abuse or offense if the child declarant is unavailable. We held in *Perez* that this requirement satisfied the *Roberts* standard for admission of hearsay statements by unavailable declarants. *Perez v. State,* 536 So.2d 206 (Fla.1988). In the present case, the abuse was corroborated by medical testimony and by two witnesses who

testified that Glendening admitted to them that he committed the offenses.[5]

[7] We also reject Glendening's argument that the trial court erred in determining that the child was competent to testify. We have been referred by Glendening to portions of the transcipt of the competency hearing which focus on the child's weakness as a witness. Other portions, however, tend to support the child's competency to testify. As this Court has previously held, it is "within the sound discretion of the trial judge to decide whether an infant of tender years has sufficient mental capacity and sense of moral obligation to be competent as a witness, and his ruling will not be disturbed unless a manifest abuse of discretion is shown." *Rutledge v. State,* 374 So.2d 975, 979 (Fla.1979), *cert. denied,* 446 U.S. 913, 100 S.Ct. 1844, 64 L.Ed.2d 267 (1980). Our examination of the record reveals no abuse of discretion on the part of the trial judge in permitting the child's testimony.[6]

The final issue involves the alleged improper admission of expert witness testimony. Rebecca Winkel, a coordinator for the child protection team, was recognized by the trial court as an expert in the area of interviewing children regarding the subject

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5. Glendening's argument that permitting videotaped testimony to be the equivalent of in-court testimony will make it easier for the state to introduce hearsay and decrease the likelihood that children will be produced for in-court testimony is without merit. The argument ignores the fact that by meeting the lower standard of demonstrating that testimony in open court will cause moderate emotional harm so that the child's testimony may be videotaped, the state is subjecting the child to cross-examination by the defense. In contrast, if the state meets the heavier burden of establishing that testimony will cause the child to suffer severe emotional harm, the defense may have no opportunity to cross-examine the child. In addition, the argument assumes that the trial court will always find that the child will suffer emotional harm if required to testify in open court. We decline to engage in such speculation.

6. Furthermore, Glendening's argument that the child must be testimonially competent in order for the child's out-of-court statements to be admitted has been rejected by this Court in *Perez v. State,* 536 So.2d 206 (Fla.1988). In *Perez,* we held that the requirement of section 90.803(23) "that the trial court find that the time, content, and circumstances of the statement provide sufficient safeguards of reliability furnishes a sufficient guarantee of trustworthiness of the hearsay statement" to satisfy the requirements of *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). At 211. In the present case, when an objection to the admission of a hearsay statement was made, the trial court properly made findings, outside the presence of the jury, that the out-of-court statements were reliable.

of child abuse. During direct examination, the prosecutor asked: "Mrs. Winkel, based upon your interview with Jennifer did you reach any opinion within a reasonable degree of professional certainty as to whether or not she had been sexually abused?" Defense counsel objected to the question on the basis that the question called for an opinion on the ultimate issue in the case and on the basis that the witness was not competent to make the conclusion. The objection to the question was overruled, with the understanding that the question was limited to the specific act alleged, anal penetration, and limited to the doll interview. The question was rephrased as follows: "Based upon your interview with Jennifer, her marking the charts, have you reached any opinion within a reasonable degree of professional certainty as to whether or not Jennifer Glendening's anus was penetrated by a penis?" In response to the question, Mrs. Winkel stated that she had. When questioned what that opinion was, Mrs. Winkel stated that it was her opinion "that Jennifer has been sexually abused by her father." Glendening contends he was prejudiced by the improper admission of this expert opinion.

The trial court correctly overruled the defense objection to the question. Rebecca Winkel was recognized, without objection by the defense, as an expert in conducting interviews with children regarding suspected sexual abuse. A trial court has broad discretion in determining the range of subjects on which an expert witness may be allowed to testify and unless there is a clear showing of error, its decision will not be disturbed on appeal. *Johnson v. State,* 393 So.2d 1069, 1072 (Fla.1980), *cert. denied,* 454 U.S. 882, 102 S.Ct. 364, 70 L.Ed.2d 191 (1981). The trial court did not abuse its discretion in determining that an opinion as to whether the child was sexually abused was within the province of the expert witness.

[8] A qualified expert may express an opinion as to whether a child has been the victim of sexual abuse. Sections 90.702 and 90.703, Florida Statutes (1985), deal with admissibility of expert testimony and opinions.

> 90.702 Testimony by experts.—If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

> 90.703 Opinion on ultimate issue.—Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it includes an ultimate issue to be decided by the trier of fact.

These two sections are subject, however, to the limitations of section 90.403, Florida Statutes (1985), which provides in relevant part:

> Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

Accordingly, the evidence code sets forth four requirements to be met in order to admit an expert opinion: (1) the opinion evidence must help the trier of fact; (2) the witness must be qualified as an expert; (3) the opinion must be capable of being applied to evidence at trial; and (4) the probative value of the opinion must not be substantially outweighed by the danger of unfair prejudice. *See Kruse v. State,* 483 So.2d 1383 (Fla. 4th DCA 1986).

Testimony in the form of an opinion by Mrs. Winkel would be helpful to the jury in view of the age of the victim. The child's age made it likely that her inexperience in sexual matters would make it difficult for her to describe what happened. The opinion of a witness such as Mrs. Winkel, recognized as an expert in interviewing suspected young victims of sexual abuse, provided the jury more information from which to decide whether the child had actually been a victim of sexual abuse. Mrs. Winkel's opinion testimony could be applied by the jury to the medical evidence to connect the findings of the medical examination to the cause. The probative value of the opinion that the child was sexually abused was not substantially outweighed by any unfair prejudice. The jury was able to hear a tape recording of the interview which formed the basis of Mrs. Winkel's opinion and heard defense arguments challenging the interview technique. The jury was properly left free to determine whether to accept the opinion and if so, what weight it should be given. *See Kruse. See also Bloodworth v. State,* 504 So.2d 495, 497 (Fla. 1st DCA 1987) (trial court did not err in allowing expert to express opinion that the victim had engaged in recent nonconsensual intercourse).

[9, 10] We agree with Glendening that it was improper for

the expert witness to testify that it was her opinion that the child's father was the person who committed the sexual offense. An opinion as to the guilt or innocence of an accused is not admissible. *See Lambrix v. State,* 494 So.2d 1143 (Fla.1986); *Spradley v. State,* 442 So.2d 1039 (Fla. 2d DCA 1983). Although section 90.703 would appear to permit such an opinion, such testimony is precluded on the basis of section 90.403. Any probative value such an opinion may possess is clearly outweighed by the danger of unfair prejudice. This error does not, however, require reversal. Except in cases of fundamental error, an issue will not be considered for the first time on appeal. *Steinhorst v. State,* 412 So.2d 332 (Fla.1982). Defense counsel neither objected to the answer nor moved to strike it and the error is not of a fundamental nature. Accordingly, the issue is not properly preserved for appeal because the question was proper and the improper reply was not contemplated by the question and was not the subject of a motion to strike.

[11] Glendening also argues that Dr. Kent, a psychologist, was improperly allowed to vouch for the credibility of a witness by stating that in his expert opinion the child's allegation, as conveyed by Mrs. Winkel, was based upon independent recall rather than improper prompting. Defense counsel's objection, however, was on the basis that the question was irrelevant, not that the question called for improper vouching for the credibility of the hearsay declarant. In order for an argument to be cognizable on appeal, it must be the specific contention asserted as the legal ground for the objection below. *Steinhorst.* Accordingly, this issue is also not properly preserved for appeal.

In summary, we conclude the district court below correctly held that section 90.803(23) is constitutional and was properly applied in the present case. Accordingly, we approve the decision of the district court below.

It is so ordered.

McDONALD, SHAW, BARKETT and KOGAN, JJ., concur.

OVERTON, J., concurs in result only.

GRIMES, J., did not participate in this case.

Fla. Stat. §

92.53 Sexual abuse or child abuse case; videotaping of testimony of victim or witness under age 16.—

(1) On motion and hearing in camera and a finding that there is a substantial likelihood that a victim or witness who is under the age of 16 would suffer at least moderate emotional or mental harm if he were required to testify in open court or that such victim or witness is otherwise unavailable as defined in s. 90.804(1), the trial court may order the videotaping of the testimony of the victim or witness in a sexual abuse case or child abuse case, whether civil or criminal in nature, which videotaped testimony is to be utilized at trial in lieu of trial testimony in open court.

(2) The motion may be filed by:

(a) The victim or witness, or the victim's or witness' attorney, parent, legal guardian, or guardian ad litem;

(b) A trial judge on his own motion.

(c) Any party in a civil proceeding; or

(d) The prosecuting attorney or the defendant, or the defendant's counsel.

(3) The judge shall preside, or shall appoint a special master to preside, at the videotaping unless the following conditions are met:

(a) The child is represented by a guardian ad litem or counsel;

(b) The representative of the victim or witness and the counsel for each party stipulate that the requirement for the presence of the judge or special master may be waived; and

(c) The court finds at a hearing on the motion that the presence of a judge or special master is not necessary to protect the victim or witness.

(4) The defendant and the defendant's counsel shall be pre-

sent at the videotaping, unless the defendant has waived this right. The court may require the defendant to view the testimony from outside the presence of the child by means of a two-way mirror or another similar method that will ensure that the defendant can observe and hear the testimony of the child in person, but that the child cannot hear or see the defendant. The defendant and the attorney for the defendant may communicate by any appropriate private method.

(5) Any party, or the court on its own motion, may request the aid of an interpreter, as provided in s. 90.606, to aid the parties in formulating methods of questioning the child and in interpreting the answers of the child throughout proceedings conducted under this section.

(6) The motion referred to in subsection (1) may be made at any time with reasonable notice to each party to the cause, and videotaping of testimony may be made any time after the court grants the motion. The videotaped testimony shall be admissible as evidence in the trial of the cause; however, such testimony shall not be admissible in any trial or proceeding in which such witness testifies by use of closed circuit television pursuant to s. 92.54.

(7) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this section.

Fla. Stat. §

90.803 Hearsay exceptions; availability of declarant immaterial.—The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:

* * *

(23) HEARSAY EXCEPTION; STATEMENT OF CHILD VICTIM OF SEXUAL ABUSE OR SEXUAL OFFENSE AGAINST A CHILD.—

(a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing any act of child abuse, sexual abuse, or any other offense involving an unlawful sexual act, contact, in-

trusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:

1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; and

2. The child either:

a. Testifies; or

b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to s. 90.804(1).

(b) In a criminal action, the defendant shall be notified no later than 10 days before trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the child's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.

(c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.

EXCERPTS FROM CHILD COMPETENCY HEARING

THE COURT: Do you know what to tell the truth means?

CHILD: Uh uh. (Negative response.)

CHILD: Uh uh. (Negative response.)

THE COURT: Okay. Do you know what a lie is?

CHILD: Making people.

THE COURT: What?

CHILD: Make people.

THE COURT: Make people? If mommy told you not to eat a cookie and you ate one would that be good or bad?

CHILD: Good.

THE COURT: Huh?

CHILD: Good.

THE COURT: That would be good?

CHILD: (Nods head affirmatively.)

THE COURT: Does mommy ever talk to you about telling the truth?

CHILD: (Shakes head negatively.)

THE COURT: No? Does mommy ever talk to you about telling a lie?

CHILD: (Shakes head negatively.)

THE COURT: Who does mommy talk to you about?

CHILD: Nobody.

THE COURT: Do you and mommy talk about a lot of things?

CHILD: (Shakes head negatively.)

R. 761-62.

* * *

THE COURT: What does being good mean? Don't know?

CHILD: Uh uh. (Negative response.)

THE COURT: Have you ever been bad?

CHILD: Uh uh. (Negative response.)

THE COURT: No?

R. 764.

* * *

THE COURT: Jenny, if your mommy said, Jenny, I don't want you to chew any gum and you chewed gum, would that be bad or good?

DEFENSE COUNSEL: Objection Your Honor, asked and answered.

CHILD: Good.

R. 764.

* * *

PROSECUTOR: Yeah. Okay. And see that pail over there in the sandbox?

CHILD: Can I go over there?

PROSECUTOR: Not right now. In a few minutes. But can you tell me the color of the pail?

CHILD: That picture?

PROSECUTOR: No, see the pail in there?

DEFENSE COUNSEL: Objection, Your Honor, leading.

CHILD: Red and white.

THE COURT: Overruled.

PROSECUTOR: Okay. Now, Jenny, if I told you that the pail was black, would I be, would I be telling the truth or telling a lie?

DEFENSE COUNSEL: Objection as to—

CHILD: Truth.

R. 767-68.

COMPARISON AND REVIEW OF STATE VIDEOTAPING STATUTES

APPLICABILITY

I. AGE

A. Seventeen or younger

R.I. Gen. Laws § 11-37-13.2 (1986)

B. Under seventeen

Ark. Stat. Ann. § 43-2036 (Supp. 1985); Mo. Stat. Ann. § 491.678 (Vernon Supp. 1989)

C. Sixteen or younger

Alaska Stat. § 12-45-047 (1984)

D. Under sixteen

Ala. Code Ann. § 15-25-2(A) (Michie Supp. 1988); Fla. Stat. § 92.53(1) (1987); Miss. Code Ann. § 13-1-407(1) (Harrison/Law. Co-op. Supp. 1988); N.H. Stat. Ann. § 30-9-17 (1986); Wis. Stat. Ann. § 967.04(7)(a)2 (West Supp. 1987) (prior to 16th birthday and interests of justice warrant)

E. Fifteen or less

Cal. Penal Code Ann. § 1346(a) (West Supp. 1989); S.D. Code Ann. § 23A-12-9 (Supp. 1987)

F. Under fifteen

Ariz. Rev. Stat. Ann. § 13-4253B (West Supp. 1988); Colo. Rev. Stat. Ann. § 18-3-413(1) (Bradford 1986); Mass. Ann. Laws ch. 278, § 16D(a) (Law. Co-op. Supp. 1988); Mich. Stat. Ann. § 27A.2163(1)(b) (Callaghan Supp. 1988)

G. Under fourteen

Iowa Code Ann. § 910A.14 (Supp. 1985); La Stat. Ann.

§ 440.2A(1) (West Supp. 1989); Nev. Rev. Stat. § 174.227 (1986); 42 Pa. Cons. Stat. Ann. § 5982 (West Supp. 1988)

H. Under thirteen

Kan. Stat. Ann. § 24-3434(a) (1986); N.H. Rev. Stat. Ann. § 517:13-a (Supp. 1987); Tenn. Code Ann. § 24-7-116(a) (Michie Supp. 1988)

I. Twelve or younger

Conn. Gen. Stat. Ann. § 54-86g(a) (West Supp. 1988); Ill. Stat. Ann. ch. 38, § 106A-2(a) (West Supp. 1988); N.Y. Crim. Proc. Law § 190.32(1)(a) (West Supp. 1989); Okla. Stat. Ann. tit. 22, § 753A (West Supp. 1988); Tex. Crim. Proc. Code Ann. art. 38.071, § 1 (Vernon Supp. 1989); Vt. R. Evid. § 807 (Supp. 1986)

J. Under twelve

Del. Code Ann. tit. 11, § 3511(a) (Michie 1987); Ky. Rev. Stat. Ann. § 421.350(4) (Baldwin 1986); Utah Code Ann. § 77-35-15.5(3) (Supp. 1987); Wis. Stat. Ann. § 967.04(7)(a)1 (West Supp. 1987); Wyo. Stat. § 7-11-408 (1987)

K. Under eleven

Ohio Rev. Code Ann. § 2907.41(A)(1) (Page 1987)

L. Under ten

Ind. Code Ann. § 35-37-4-8(b) (West 1986); Minn. Stat. Ann. § 595.02(4)(a) (West Supp. 1989)

M. "Very young"

S.C. Code Ann. § 16-3-1530(G) (Law. Co-op. Supp. 1988)

II. PERSON

A. Child victim of sexual offense

Every statute applies to child victims of sexual offenses. *See, e.g.*, Ala. Code Ann. § 15-25-2(a) (Michie Supp. 1988)

B. Child victim of other crimes

Cal. Penal Code Ann. § 1346 (West Supp. 1989) (assault); Conn. Gen. Stat. Ann. § 54.86g(a) (West Supp. 1988) (assault); Fla. Stat. § 92.53(1) (1987) (child abuse); Ind. Code Ann. § 35-37-4-6(a) (West 1986) (battery, kidnapping, confinement); Minn. Stat. Ann. § 595.02(4) (West Supp. 1989) (physical abuse, neglect); Mo. Stat. Ann. § 491.680(1) (Vernon Supp. 1989) (any criminal prosecution involving alleged child victim); Ohio Rev. Code Ann. § 2907.41(A)(1) (Page 1987) (endangering)

C. Any child witness

Ariz. Rev. Stat. Ann. § 13-4253 B (West Supp. 1988); Del. Code Ann. tit. 11, § 3511(a) (Michie 1987); Fla. Stat. § 92.53(1) (1987); Kan. Stat. Ann. § 24-3434 (1986); Mass. Ann. Laws ch. 278, § 16D(a) (Law. Co-op. Supp. 1988); Miss. Code Ann. § 13-1-407(1) (Harrison/Law. Co-op. Supp. 1988); N.Y. Crim. Proc. Law § 190.32(1)(a) (West Supp. 1989); Okla. Stat. Ann. tit. 22, § 753A (West Supp. 1988); 42 Pa. Cons. Stat. Ann. § 5984(a) (West Supp. 1988); S.C. Code Ann. § 16-3-1530(G) (Law. Co-op. Supp. 1988); Wis. Stat. Ann. § 967.04(7)(a) (West Supp. 1987)

D. Other witnesses

Cal. Penal Code Ann. § 1346(a) (West Supp. 1989) (any victim developmentally disabled as result of retardation); Mich. Stat. Ann. § 27A.2163(1) (Callaghan Supp. 1988) (victim with developmental disability); S.C. Code Ann. § 16-3-1530(G) (Law. Co-op. Supp. 1988) (victims and witnesses who are elderly or handicapped or have undefined "special needs")

III. PROCEEDINGS WHERE USED

A. Trial

Ala. Code Ann. § 15-25-2(a) (Michie Supp. 1988); Ariz. Rev. Stat. § 13-4253C (West Supp. 1988); Ark. Stat. Ann. § 43.2036 (Supp. 1985); Cal. Penal Code Ann. § 1346(d) (West Supp. 1989); Colo. Rev. Stat. Ann. § 18-3-413(4) (Bradford 1986); Conn. Gen. Stat. Ann. § 54-86g(b) (West Supp. 1988); Del. Code Ann. tit. 11, § 3511(b) (Michie 1987); Fla. Stat. § 92.53(1) (1987); Ill. Stat. Ann ch. 38, § 106A-2(b) (West Supp. 1988); Ind. Code Ann. § 35-37-4-6 (West 1986); Kan. Stat. Ann. § 22-3434(c) (Supp. 1985); Mass. Ann. Laws ch. 278, § 16D(b)(6) (Law. Co-op. Supp. 1988); Mich. Stat. Ann. § 27A.2163(13) (Callaghan Supp. 1988); Minn. Stat. Ann. § 595.02(4) (West Supp. 1989); Miss. Code Ann. § 13-1-407(1) (Harrison/Law. Co-op. Supp. 1988); Mo. Stat. Ann. § 491.680(1) (Vernon Supp. 1989); Ohio Rev. Code Ann. §§ 2907.41(A), 2945.49(B) (Page 1987); Okla. Stat. Ann. tit. 22, § 753D (West Supp. 1988); 42 Pa. Cons. Stat. Ann. § 5984(a) (West Supp. 1988); Tenn. Code Ann. § 24-7-116(d) (Michie Supp. 1988); Tex. Crim. Proc. Code art. 38.071, § 4(a) (Vernon Supp. 1989); Wis. Stat. Ann. § 967.04(7)(a) (West Supp. 1987)

B. Preliminary hearing

Cal. Penal Code Ann. § 1346(a) (West Supp. 1989); 42 Pa. Cons. Stat. Ann. § 5984(a) (West Supp. 1988)

C. Juvenile Proceeding

Del Code Ann. tit. 11, § 3511(a) (Michie 1987); La. Stat. Ann. § 440.2.A.(3) (West Supp. 1989)

D. Grand Jury

N.Y. Crim. Proc. Law § 190.32 (West Supp. 1989)

E. Civil Proceedings

Ariz. Rev. Stat. Ann. § 13-42501 (West Supp. 1988); Miss. Code Ann. § 13-1-407(1) (Harrison/Law. Co-op. Supp. 1988) (where occurrence or non-occurrence of sexual abuse or child abuse is material fact); Tenn. Code Ann. § 24-7-116(a) (Michie Supp. 1988) (any civil proceeding in which child sexual abuse is issue)

PROCEDURE

I. MOVANT

A. Prosecutor

Ala. Code Ann. § 15-25-2(a) (Michie Supp. 1988); Alaska Stat. § 12.45.047 (1984); Ariz. Rev. Stat. Ann. § 13-4253B (West Supp. 1988); Ark. Stat. Ann. § 43-2036 (Supp. 1985); Cal. Penal Code Ann. § 1346(a) (West Supp. 1989); Colo. Rev. Stat. Ann. § 18-3-413(1) (Bradford 1986); Del. Code Ann. tit. 11, § 3511(a) (Michie 1987); Ill. Stat. Ann. ch. 38, § 106A-2(a) (West Supp. 1988); Mo. Stat. Ann. § 491.680(1) (Vernon Supp. 1989); Nev. Rev. Stat. § 174.227 (1986); N.Y. Crim. Proc. Law § 190.32(2) (West Supp. 1989); Ohio Rev. Code Ann. § 2907.41(A)(1) (Page 1987); 42 Pa. Cons. Stat. Ann. § 5984(a) (West Supp. 1988); Utah Code Ann. § 77-35-15.5 (Supp. 1987)

B. Any party

Conn. Gen. Stat. Ann. § 54-86g(a) (West Supp. 1988); Fla. Stat. § 92.53(2)(c),(d) (1987); Iowa Code Ann. § 910A.14 (Supp. 1985); Kan. Stat. Ann. § 22-3434 (1986); Ky. Rev. Stat. Ann. § 421.350(4) (Baldwin 1986); Minn. Stat. Ann. § 595.02(4) (West Supp. 1989); N.H. Rev. Stat. Ann. § 517:13-a (Supp. 1987); Okla. Stat. Ann. tit. 22, § 753C (West Supp. 1988); Tenn. Code Ann. § 24-7-116(d) (Michie Supp. 1988); Tex. Crim. Proc. Code Ann. art. 38.071, § 4(a) (Vernon Supp. 1989); Vt. R. Evid. § 807 (Supp. 1986)

C. Court

Fla. Stat. § 92.53(2)(b) (1987); Iowa Code Ann. § 910A.14 (Supp. 1985); Kan. Stat. Ann. § 22-3434 (1986); La. Stat. Ann. § 440.2.A.(1) (West Supp. 1989); Mass. Ann. Laws ch. 278, § 16D(b)(1) (Law. Co-op. Supp. 1988); Minn. Stat. Ann. § 595.02(4) (West Supp. 1989); Nev. Rev. Stat. § 174.227 (1986); N.H. Rev. Stat. Ann. § 517:13-a (Supp. 1987); Tex. Crim. Proc. Code Ann. art. 38.071, § 4(a) (Vernon Supp. 1989); Vt. R. Evid. § 807 (Supp. 1986)

D. Representative of child

Fla. Stat. § 92.53(2)(a) (1987) (attorney, parent, legal guardian, or guardian ad litem); La. Stat. Ann. § 440.2.A.(1) (West Supp. 1989) (parish welfare unit or agency or Department of Health and Human Resources); N.H. Rev. Stat. Ann. § 517:13-a (Supp. 1987) (victim); 42 Pa. Cons. Stat. Ann. § 5984(a) (West Supp. 1988) (parent, guardian, or child's advocate); Vt. R. Evid. § 807 (Supp. 1986) (guardian ad litem). In Mississippi the child's representative may move to require the defendant to view the testimony outside of the child's presence. Miss. Code Ann. § 13-1-407(4) (Harrison/Law. Co-op. Supp. 1988)

II. NOTICE TO DEFENDANT

Ala. Code Ann. § 15-25-2(a) (Michie Supp. 1988); Alaska Stat. § 12.45.047 (1984); Ark. Stat. Ann. § 43-2036 (Supp. 1985); Ariz. Rev. Stat. Ann. § 13-4251 (West Supp. 1988); Colo. Rev. Stat. Ann. § 18.3.413 (Bradford 1986); Fla. Stat. § 92.53(6) (1987); Ind. Code Ann. § 35-35-4-6(c) (West 1986)

III. HEARING

Fla. Stat. § 92.53(1) (1987) (hearing in camera); Ind. Code Ann. § 13-37-4-6(c)(1) (West 1986) (hearing outside presence of jury and attended by child); Mass. Ann. Laws ch. 278, § 16D(b)(1) (Law. Co-op. Supp. 1988); Miss. Code Ann. § 13-1-407(1) (Harrison/Law. Co-op. Supp. 1988) (hearing in camera); N.H. Rev. Stat. § 174.227 (1986)

PERSONS PRESENT

I. ATTORNEYS

Ala. Code Ann. § 15-25-2(a) (Michie Supp. 1988); Ariz. Rev. Stat. Ann. § 13-4253B (West Supp. 1988); Ark. Stat. Ann. § 43-2036 (Supp. 1985); Conn. Gen. Stat. Ann. § 54-86g(a) (West Supp. 1988); Del. Code Ann. tit. 11, § 3511(a) (Michie 1987); Fla. Stat. § 92.53(4) (1987); Ill. Stat. Ann. ch. 38, § 106A-2(a) (West Supp. 1988); Kan. Stat. Ann. § 22-3434(b)(1) (1986); Mass.

Ann. Laws ch. 278, § 16D(b)(3) (Law. Co-op. Supp. 1988); Minn. Stat. Ann. § 595.02(4)(b) (West Supp. 1989); Ohio Rev. Code Ann. § 2907.41(A)(1)(2) (Page 1987); Okla. Stat. Ann. tit. 22, § 753C (West Supp. 1988) 42 Pa. Cons. Stat. Ann. § 5984(a) (West Supp. 1988); Tenn. Code Ann. § 24-7-116(d) (Michie Supp. 1988); Tex. Crim. Proc. Code Ann. art. 38.071, § 4(a) (Vernon Supp. 1989)

II. JUDGE

Ark. Stat. Ann. § 43-2036 (Supp. 1985); Conn. Gen. Stat. Ann. § 54-86g(a) (West Supp. 1988); Fla. Stat. § 92.53(3) (1987) (unless parties and child's representative waive and judge finds not necessary to protect child); Ill. Stat. Ann. ch. 38, § 106A-2(a) (West Supp. 1988); Mass. Ann. Laws ch. 278, § 16D(b)(3) (Law. Co-op. Supp. 1988); Minn. Stat. Ann. § 595.02(4)(b) (West Supp. 1989); Mo. Stat. Ann. § 491.680(3) (Vernon Supp. 1989); Ohio Rev. Code Ann. § 2907.41(A)(1)(2) (Page 1987) (judge may preside from outside room); 42 Pa. Cons. Stat. Ann. § 5984(a) (West Supp. 1988); Tenn. Code Ann. § 24-7-116(d) (Michie Supp. 1988); Tex. Crim. Proc. Code Ann. art. 38.071, § 4(a) (Vernon Supp. 1989); Wis. Stat. Ann. § 967.04(8)(a) (West Supp. 1987)

III. DEFENDANT REQUIRED

Ala. Code Ann. § 15-25-2(a) (Michie Supp. 1988); Ill. Stat. Ann. ch. 38, § 106A-2(a) (West Supp. 1988); Ohio Rev. Code Ann. § 2907.41(A)(1) (Page 1987)

IV. DEFENDANT PROHIBITED

Ark. Stat. Ann. §§ 43-2035 to 2037 (Supp. 1985); Kan. Stat. Ann. § 22-3434(b)(4) (1986); Ky. Rev. Stat. Ann. § 421.350(4) (Baldwin 1986); Mich. Stat. Ann. § 27A.2163(14) (Callaghan Supp. 1988); R.I. Gen. Laws § 11-37-13.2 (1986); Utah Code Ann. § 77-35-15.5(3),(4) (Supp. 1987)

V. DEFENDANT MAY BE EXCLUDED

Del. Code Ann. tit. 11, § 3511(a) (Michie 1987); Fla.

Stat. § 92.53(4) (1987); Mass. Ann. Laws ch. 278, § 16D(b)(3) (Law. Co-op. Supp. 1988); Minn. Stat. Ann. § 595.02(4)(c) (West Supp. 1989); Miss. Code Ann. § 13-1-407(4) (Harrison/Law. Co-op. Supp. 1988); Mo. Stat. Ann. § 491.685(1) (Vernon Supp. 1989); Vt. R. Evid. § 807 (Supp. 1986); Wyo. Stat. § 7-11-408 (1987)

VI. DEFENDANT ON TELEVISION MONITOR

Minn. Stat. Ann. § 595.02(4)(c)(2) (West Supp. 1989); Ohio Rev. Code Ann. § 2907.41(A)(2) (Page 1987)

VII. EXCLUDED DEFENDANT COMMUNICATE WITH ATTORNEY

Conn. Gen. Stat. Ann. § 54-86g(a) (West Supp. 1988) (defendant may consult with his attorney); Del. Code Ann. tit. 11, § 3511(a) (Michie 1987) (defendant able to communicate with his attorney); Fla. Stat. § 92.53(4) (1987) (defendant and attorney may communicate by any appropriate private method); Mass. Ann. Laws ch. 278, 16D(b)(5) (Law. Co-op. Supp. 1988) (defendant able to have constant private communication with defense counsel); Mich. Stat. Ann. § 27A.2163(12)(b) (Callaghan Supp. 1988) (defendant able to communicate with his or her attorney); Miss. Code Ann. § 13-1-407 (Harrison/Law. Co-op. Supp. 1988) (defendant and attorney may communicate by any appropriate private electronic or telephonic method); Ohio Rev. Code Ann. § 2907.41(A)(2) (Page 1987) (defendant provided electronic means of immediate communication with his attorney); 42 Pa. Cons. Stat. Ann. § 5984(a) (West Supp. 1988) (defendant and defense counsel shall have adequate opportunity to communicate); Tex. Crim. Proc. Code Ann. art. 38.071, § 4(a) (Vernon Supp. 1989) (permit defendant to communicate contemporaneously with his attorney during periods of recess or by audio contact); Wis. Stat. Ann. § 967.04(8)(b)(9) (West Supp. 1987) (defendant can communicate privately and conveniently with his counsel)

VIII. EQUIPMENT OPERATOR

Del. Code Ann. tit. 11, § 3511(a) (Michie 1987); Ill.

Stat. Ann. ch. 38, § 106A-2(a) (West Supp. 1988); Minn. Stat. Ann. § 595.02(4)(b) (West Supp. 1989); 42 Pa. Cons. Stat. Ann. § 5984(a) (West Supp. 1988)

IX. OPERATOR CONFINED FROM VIEW

Ariz. Rev. Stat. Ann. § 13-4253B (West Supp. 1988); Kan. Stat. Ann. § 22-3434(b)(3) (1986); Ohio Rev. Code Ann. § 2907.41(A)(2) (Page 1987); Okla. Stat. Ann. tit. 22, § 753C (West Supp. 1988); Tenn. Code Ann. § 24-7-116(d) (Michie Supp. 1988); Tex. Crim. Proc. Code Ann. art. 38.071, § 4(a) (Vernon Supp. 1989)

X. SUPPORT PERSON

Ariz. Rev. Stat. Ann. § 13-4253B (West Supp. 1988) (any person whose presence would contribute to welfare and well-being of minor); Conn. Gen. Stat. Ann. § 54-86g (West Supp. 1988); Del. Code Ann. tit. 11, § 3511(a) (Michie 1987); Ill. Stat. Ann. ch. 38, § 106A-2(a) (West Supp. 1988); Kan. Stat. Ann. § 22-3434(b)(1) (1986); Minn. Stat. Ann. § 595.02(4)(b) (West Supp. 1989); N.Y. Crim. Proc. Law § 190.3(5)(c) (West Supp. 1989) (doctor, nurse, or other medical assistant if required); *id.* § 190.25 (3)(h) (social worker, rape crisis counselor, psychologist, or other professional); Ohio Rev. Code Ann. § 2907.41(A)(2) (Page 1987)) (one person chosen by child and any person whose presence judge determines would contribute to welfare and well-being of child); Okla. Stat. Ann. tit. 22, § 753C (West Supp. 1988); 42 Pa. Cons. Stat. Ann. § 5984(a) (West Supp. 1988); Tenn. Code Ann. § 24-7-116(d) (Michie Supp. 1988); Tex. Crim. Proc. Code Ann. art. 38.071, § 4(a) (Vernon Supp. 1989); Wis. Stat. Ann. § 967.04(8)(b)(11) (West Supp. 1987) (reasonable number of persons deemed by court supportive of child)

XI. OTHERS

Fla. Stat. § 92.53(5) (1987) (interpreter if child cannot be reasonably understood); Ill. Stat. Ann. ch. 38, § 106A-2(a) (West Supp. 1988) (security personnel); Ohio Rev. Code Ann. § 2907.41(A)(2) (Page 1987) (interpreters); 42 Pa. Cons. Stat. Ann. § 5984(a) (West Supp.

1988) (shorthand reporter); Wis. Stat. Ann. § 967.04(8)(b)(6) (West Supp. 1987) (advisors to assist questioners)

XII. PLACE

A. Chambers

Ark. Stat. Ann. § 43-2036 (Supp. 1985); Mo. Stat. Ann. § 491.680(1) (Vernon Supp. 1989); 42 Pa. Cons. Stat. Ann. § 5984(a) (West Supp. 1988)

B. Outside courtroom

Ariz. Rev. Stat. Ann. § 13-4253B (West Supp. 1988); Conn. Gen. Stat. Ann. § 54-86g(a) (West Supp. 1988); Kan. Stat. Ann. § 22-3434(a)(2) (1986); Tex. Crim. Proc. Code Ann. art. 38.071, § 4(a) (Vernon Supp. 1989); Utah Code Ann. § 77-35-15.5(3), (4) (Supp. 1987); Vt. R. Evid. § 807 (Supp. 1986)

C. Special facility

42 Pa. Cons. Stat. Ann. § 5984(a) (West Supp. 1988) (special facility designed for taking depositions of children); Wis. Stat. Ann. § 967.04(8)(b)(2) (West Supp. 1987) (room which provides adequate privacy, freedom from distractions, informality, and comfort appropriate to child's developmental level)

XIII. TESTIMONY

A. Oath or admonishment

Mo. Stat. Ann. § 491.693 (Vernon Supp. 1989); Tex. Crim. Proc. Code Ann. art. 38.071, § 4(b)(5) (Vernon Supp. 1989); Wis. Stat. Ann. § 967.04(8)(b)(4) (West Supp. 1987) (if oath or affirmation inappropriate court shall determine that child understands it is wrong to tell a lie and will testify truthfully)

B. Competency

Tex. Crim. Proc. Code Ann. art. 38.071, § 4(b)(6) (Vernon Supp. 1989)

C. Questioners

Del. Code Ann. tit. 11, § 3511(a) (Michie 1987) (only attorneys or defendant acting pro se); Ill. Stat. Ann. ch. 38, § 106A-2(a) (West Supp. 1988) (prosecutor or court); Kan. Stat. Ann. § 22-3434(b)(2) (1986); Okla. Stat. Ann. tit. 22, § 753C (West Supp. 1988) (only attorneys); Tenn. Code Ann. § 24-7-116(d) (Michie Supp. 1988) (attorneys or court); Wis. Stat. Ann. § 967.04(8)(b)(6) (West Supp. 1987) (advisor may assist questioner or conduct questioning)

D. Second Occasion

Mo. Stat. Ann. § 491.680(4) (Vernon Supp. 1989) (cross-examination prior to preliminary hearing and at least one additional time prior to trial); Ohio Rev. Code Ann. § 2907.41(A)(1) (Page 1987) (defense may request another deposition upon discovery of new evidence material to defense that could not have been discovered with reasonable diligence before first deposition); Tenn. Code Ann. § 24-7-116(e) (Michie Supp. 1988) (on motion of either party for good cause court may order additional testimony if time and circumstances permit or testimony in court restricted to specified matters)

STANDARD OF NECESSITY

A. GOOD CAUSE

Ala. Code Ann. § 15-25-2(a) (Michie Supp. 1988); Ariz. Stat. Ann. § 13-4253B (West Supp. 1988); Ark. Stat. Ann. § 43-2036 (Supp. 1985); 42 Pa. Cons. Stat. Ann. § 5984(a) (West Supp. 1988); Utah Code Ann. § 77-35-15.5(3), (4) (Supp. 1987)

B. APPROPRIATE

S.C. Code Ann. § 16-3-1530(G) (Law. Co-op. Supp. 1988)

C. IN THE INTEREST OF JUSTICE

Wis. Stat. Ann. § 967.04(7) (West Supp. 1987) (10 factors listed for consideration)

D. UNAVAILABLE UNDER EVIDENTIARY RULES

Miss. Code Ann. § 13-1-407(1)(b) (Harrison/Law. Co-op. Supp. 1988) (otherwise unavailable); Ohio Rev. Code Ann. § 2907.41(B)(1) (Page 1987) (unavailable under evidentiary rules)

C. MEDICALLY OR PSYCHIATRICALLY UNAVAILABLE

Cal. Penal Code Ann. § 1346(d) (West Supp. 1989) (emotional trauma so that victim is medically unavailable or unavailable within meaning of Evidence Code); Colo. Rev. Stat. Ann. § 18-3-413(4) (Bradford 1986) (emotional trauma so that victim is medically or otherwise unavailable); Ind. Code Ann. § 35-37-4-6(c)(2)(B) (West 1986) (unavailable because a psychiatrist has certified that testifying would be traumatic or physician has certified medical reasons for child not to testify)

D. INCOMPETENT

Ind. Code Ann. § 35-37-4-6(c)(2)(iii) (West 1986) (incapable of understanding nature and obligation of oath); Minn. Stat. Ann. § 595.02(3) (West Supp. 1989) (incompetent)

E. TRAUMA

Fla. Stat. § 92.53(1) (1987) (at least moderate emotional or mental harm); Mass. Ann. Laws ch. 278, § 16D(b)(1) (Law. Co-op. Supp. 1988) (psychological or emotional trauma); Miss. Code Ann. § 13-1-407(1)(a) (Harrison/Law. Co-op. Supp. 1988) (traumatic emotional or mental distress); N.M. Sup. Ct. R. Ann. 1986, 5-504(B)(1) (Cum. Supp. 1988) (unreasonable or unnecessary harm); Ohio Rev. Code Ann. § 2907.41(B)(1)(b) (Page 1987) (serious emotional trauma); R.I. Gen. Laws § 11-37-13.2 (1986) (unreasonable or unnecessary harm); S.D. Code Ann. § 23A-12-9 (Supp. 1987) (substantially detrimental); Wyo. Stat. § 7-11-408 (1987) (harm which would render child incapable of testifying)

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

SECOND DISTRICT

CASE NO. 86-88

DAVID EDWARD GLENDENING,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

Opinion filed January 14, 1987.

Appeal from the Circuit
Court for Sarasota County;
Andrew Owens, Jr., Judge.

Ronald K. Cacciatore, Tampa,
for Appellant.

Jim Smith, Attorney General,
Tallahassee, and Kim W. Munch,
Assistant Attorney General,
Tampa, for Appellee.

GRIMES, Judge.

This is an appeal from a conviction of sexual battery on a child eleven years of age or younger.

The major thrust of appellant's argument is that the court erred in admitting out-of-court statements made by Jennifer Glendening, the appellant's 3-½ year-old daughter, which implicated appellant. The testimony concerning these statements could only have been admitted under section 90.803(23), Florida Statutes (1985). Appellant not only attacks the constitutionality

of the statute and argues its inapplicability to him but also contends that there was no compliance with its requirements.

Section 90.803(23) reads as follows:

(23) HEARSAY EXCEPTION; STATEMENT OF CHILD VICTIM OF SEXUAL ABUSE OR SEXUAL OFFENSE AGAINST A CHILD.—

(a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing any act of child abuse, sexual abuse, or any other offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:

1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; and

2. The child either:

a. Testifies; or

b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to s. 90.804(1).

(b) In a criminal action, the defendant shall be notified no later than 10 days before trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include

> a written statement of the content of the child's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.
>
> (c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.

In arguing facial unconstitutionality, appellant contends that section 90.803(23) violates the sixth amendment to the United States Constitution and article I, section 16, of the Florida Constitution, both of which guarantee an accused the right to confront adverse witnesses. However, the United States Supreme Court has held that the confrontation clause is satisfied when a declarant whose out-of-court statement is sought to be introduced is available for cross-examination at the trial or if found to be unavailable, the statement bears adequate "indicia of reliability." *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). Section 90.803(23) tracks the requirements of *Ohio v. Roberts.*

Comparable statutes providing for the admissibility of out-of-court statements by child abuse victims have been held constitutional in other jurisdictions. *State v. Myatt,* 237 Kan. 17, 697 P.2d 836 (1985); *State v. Bellotti,* 383 N.W.2d 308 (Minn. Ct. App. 1986); *State v. Ryan,* 103 Wash.2d 165, 691 P.2d 197 (1984).

> The statute is intended to allow the courts to be sensitive to the critical need for a child victim's out-of-court statements, while allowing them to address the various reliability problems posed by the statements, thus protecting the defendant's confrontation rights.

697 P.2d at 842. We hold that section 90.803(23) does not violate the confrontation clauses of the United States and Florida Constitutions.

Appellant also argues that since he was charged with a criminal offense occurring between September 1, 1984, and June 24, 1985, the provisions of section 90.803(23) cannot be employed

against him because the statute did not become effective until July 1, 1985. He contends that the admission of the out-of-court statements which are covered by that statute constituted an ex post facto application of the law. An ex post facto law is one which either punishes an act which was innocent when committed, makes the punishment for the offense more burdensome, or deprives the accused of a defense which was available when the offense was committed. *Dobbert v. Florida,* 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344, *rehearing denied,* 434 U.S. 882, 98 S.Ct. 246, 54 L.Ed.2d 166 (1977). Clearly, section 90.803(23) did not increase the punishment or deprive appellant of a defense. Moreover, the statute had no effect upon whether appellant committed the crime but simply made it easier to prove. *State v. Ryan.* Thus, section 90.803(23) as applied to appellant did not violate article I, section 10, of the United States and Florida Constitutions.

Finally, appellant argues that even under the statute, the court erred in permitting several witnesses to testify that Jennifer had made prior statements to them concerning the misconduct with which he was charged. In order to address this point, it is first necessary to discuss certain matters which took place during the progress of the case.

Prior to trial, the state served a motion to video tape Jennifer's testimony for introduction at trial pursuant to section 92.53, Florida Statutes (1985). After hearing evidence on the motion and making the requisite finding that there was substantial likelihood that Jennifer would suffer at least moderate emotional or mental harm if she were required to testify in open court, the court entered an order permitting the video taping and requiring appellant to view the testimony outside Jennifer's presence.

At the video taping session, the court first conducted a voir dire examination of the child to determine her competency to testify. The court concluded that she was competent because she showed an above average intelligence for a 3-½ year-old and was aware of her surroundings. The court attributed her inability to explain the difference between the truth and a lie to the inartful questioning by the court and the state attorney. Thereafter, when

the child was interrogated concerning the matters involved in the case, she did not implicate her father in any misconduct. As a consequence, appellant did not object to the introduction of the video tape into evidence at the trial and, in fact, caused it to be replayed as part of his defense. Hence, there is no contention on appeal over the admissibility of the video tape. However, the fact that the video tape was authorized and played at the trial is relevant to our subsequent discussion.

About a month before trial, appellant made a motion to exclude all hearsay statements made by the child. The state filed a response in which it enumerated the various hearsay statements it intended to introduce. The court ruled that the state's response did not constitute adequate compliance with the notice requirements of section 90.803(23) and permitted the state to file a more detailed response. Thereafter, but more than ten days before trial, the state filed a detailed recitation of the out-of-court statements to be offered at trial in order to comply with the notice mandated by section 90.803(23)(b). At a subsequent hearing, the court observed that it could not rule upon the admissibility of such statements without actually hearing the witnesses' testimony concerning the circumstances under which the child's statements were made.

Dr. Linda Boczar was the first of the witnesses listed on the notice who testified. However, appellant cannot now complain about her testimony because his counsel stated at the trial that he had no objection to her stating what Jennifer had told her.

The next of the disputed witnesses was Rebecca Winkel, a coordinator for the child protection team. Ms. Winkel testified concerning the circumstances under which the child made incriminating statements about her father and the content of such statements. Except for an initial objection on grounds of corpus delicti, the appellant did not object to this testimony until after it was given. At this point, appellant objected on hearsay grounds, whereupon the court asked the jury to be removed and made the following statement on the record:

THE COURT: At this time Mr. Dirmann had raised an objection concerning the hearsay exception to some of the testimony by Mrs. Winkel. The court would feel that the objection has been waived in view of the timing of the objection but in an abundance of caution and in view of the fact that we're all operating under a brand new legislative enactment, which only came into effect this year, amending section 90.803 and allowing, making an exception of children or child victim statements of sexual abuse, which requires the court to have a hearing conducted outside the presence of the jury as to the time, content and circumstances of the statement providing sufficent safeguards of reliability in making the determination. The court has heard the testimony of Mrs. Winkel concerning the doll interview. Based upon the testimony presented by Mrs. Winkel here under oath the court would find as to the time, I'm not certain of the exact time but there was certainly no coercion of the child, that the interview was conducted with a period of play where the child became familiar with the interviewer and that she was not prompted by the interviewer in the use of the dolls and describing these alleged sexual acts. The court would find that the content and the circumstances surrounding the statement under these circumstances would provide sufficient safeguards of reliability to allow the admission of that testimony as an exception to the hearsay rule under subsection 23.

The third witness to testify concerning what Jennifer had told her was Detective Barber. When the appellant objected on grounds of hearsay and of relevance to section 90.803(23), the court listened to a proffer of her testimony outside the presence of the jury. The court then ruled that because the child's statement to Detective Barber was not a direct reference to child abuse or sexual abuse, Detective Barber could not testify unless the state could demonstrate that the child's statement was relevant to proving that appellant was guilty of such misconduct. Later in the trial the state introduced other evidence which showed how Jennifer's statement to Detective Barber was relevant to prove that Jennifer's father had sexually abused her. Thereupon, the court permitted Detective Barber to state what the child had told her.

The last witness who testified concerning the child's statements was Ruth Shapiro, a social worker at the Suncoast Mental

Health Center. At the outset, the court conducted a hearing outside the presence of the jury to determine whether Ms. Shapiro could testify concerning the child's hearsay statements. Ms. Shapiro was interrogated at length concerning the content of the statements and the circumstances under which they were made. The court excluded certain statements and ruled that others could be admitted since they met the standards of section 90.803(23).

In regard to the argument that the requirements of the statute were not followed, appellant first contends that the court failed to make a finding "in a hearing conducted outside the presence of the jury that the time, content and circumstances of the statement provide sufficient safeguards of reliability" as required by section 90.803(23)(a)1. With respect to Ms. Winkel, we concur with the court's conclusion that appellant's hearsay objection was untimely. In any event, at the point the objection was made, the court then removed the jury and made the requisite findings predicated upon the testimony which had already been presented.

When the state recalled Detective Barber to the stand, appellant did not object on grounds of hearsay, as such, but only argued relevancy. By this time, however, the state had demonstrated how the child's statement was directly related to the contention that her father had abused her, and the court properly rejected appellant's argument on this issue. The court was obviously satisfied with the credibility of the child's statements to Detective Barber because the detective had previously testified outside the presence of the jury. The court cannot be faulted for failing to announce the findings specified by section 90.803(23)(a)1. when appellant was then only arguing relevance and was making no objection to the procedure being followed.

Significantly, appellant does not assert that the court did not comply with the procedural aspects of section 90.803(23) with respect to Ms. Shapiro's testimony. By the time Ms. Shapiro testified, everyone had become familiar with the intricacies of the statute. Her testimony was first proffered outside the presence of the jury. There was ample evidence to support the court's finding that Jennifer's out-of-court statements made to Ms. Shapiro

were reliable.

Appellant further argues that even if the court substantially complied with the requirements of subparagraph 1. of section 90.803(23)(a), the court made no finding whatsoever with respect to subparagraph 2. which requires that the child either testify or be unavailable as a witness. Appellant notes that in order to be declared unavailable for purposes of this subparagraph, the child would have to meet the definition of unavailability under section 90.804(1) or the court would have to conclude that the child's participation in the trial would result in "a substantial likelihood of severe emotional or mental harm." We cannot sustain the state's response that the hearing previously conducted for the purpose of deciding whether to permit the child's testimony to be video taped would suffice. Aside from the fact that the hearing was held for a different purpose, the standard for permitting video taping is whether the child would suffer at least moderate emotional or mental harm, whereas a finding of unavailability is predicated upon a substantial likelihood of severe emotional or mental harm. Notwithstanding, we believe that it was unnecessary that the court make a finding of unavailability in this case because the child did, in fact, testify. Her testimony was taken before the court with participation by both attorneys just as it would have been had the child been physically present at trial. Appellant was in a position to cross-examine her concerning the out-of-court statements because the state's notice for introduction of these statements had already been filed. Therefore, we hold that for purposes of section 90.803(23)(a)2., the introduction of Jennifer's video tape was equivalent to her having personally testified.

Finally, appellant also contends that the court's findings that Jennifer's statements were reliable cannot be sustained because it was demonstrated in her video taped testimony that she was unable to articulate the difference between the truth and a lie, an essential element of the traditional test for determining the competency of a witness of tender years. *Bell v. State,* 93 So.2d 575 (Fla. 1957). See § 90.605(2), Fla. Stat. (1985). However, we do not need to reach the question of whether the court correctly concluded that Jennifer was competent to testify because this is

not the criterion for the introduction of hearsay statements under section 90.803(23). The mere fact that a child has been deemed incompetent to testify will not render his out-of-court statements concerning child abuse or sexual abuse unreliable for admission under section 90.803(23). *See State v. Superior Court,* 149 Ariz. 397, 719 P.2d 283 (Ct. App. 1986); *State v. Myatt; State v. Bellotti; State v. Campbell,* 299 Or. 633, 705 P.2d 694 (1985); *Contra State v. Ryan.* The record adequately supports the court's conclusion that Jennifer's out-of-court statements were sufficiently reliable for introduction into evidence.

Appellant's other points on appeal are without merit.

Affirmed.

DANAHY, C.J., and HALL, J., Concur.